No. 220132 ORG
Title: Alabama, et al., Plaintiffs
v.
North Carolina
Docketed: June 3, 2002
Questions Presented

Date	Proceedings and Orders
Jun 3 2002	Motion for leave to file a bill of complaint filed.
Aug 5 2002	Brief of respondent North Carolina in opposition filed.
Aug 21 2002	DISTRIBUTED for Conference of September 30, 2002.
Aug 21 2002	Reply of petitioner Alabama, et al., Plaintiffs filed.
Oct 7 2002	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Apr 22 2003	Brief amicus curiae of United States filed.
Apr 30 2003	Supplemental brief of petitioner Alabama, et al., Plaintiffs filed.
May 1 2003	Supplemental brief of respondent North Carolina filed.
May 6 2003	DISTRIBUTED for Conference of May 22, 2003.
May 27 2003	REDISTRIBUTED for Conference of May 29, 2003.
Jun 2 2003	REDISTRIBUTED for Conference of June 5, 2003.
Jun 12 2003	REDISTRIBUTED for Conference of June 12, 2003.
Jun 16 2003	Motion for leave to file a bill of complaint GRANTED. Defendant is allowed thirty days within which to file an answer.
Jul 1 2003	Order extending time to file an answer to the bill of complaint to and including August 15, 2003.
Aug 15 2003	Answer to Bill of Complaint filed by North Carolina
Aug 15 2003	Motion to dismiss filed by respondent North Carolina.
Aug 20 2003	Order extending time to file a response to the motion to dismiss to and including September 24, 2003.
Sep 24 2003	Response to motion to dismiss from petitioner Alabama, et al., Plaintiffs filed.
Oct 7 2003	Reply in Support of Motion to Dismiss of respondent North Carolina filed.
Oct 8 2003	DISTRIBUTED for Conference of October 31, 2003.
Nov 3 2003	DISTRIBUTED for Conference of November 7, 2003.
Nov 10 2003	DISTRIBUTED for Conference of November 14, 2003.
Nov 17 2003	IT IS ORDERED that Bradford R. Clark, Esquire, of Washington, D.C., be appointed as Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such Reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic and clerical assistants, the cost of printing his Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.
Dec 26 2006	Motion for fees and reimbursement of expenses for the period November 17, 2003 through

	October 31, 2006, filed by Special Master.
Jan 10 2007	DISTRIBUTED for Conference of February 16, 2007.
Feb 20 2007	Motion for fees and reimbursement of expenses for the period November 17, 2003 through October 31, 2006, GRANTED
Apr 2 2009	Preliminary Report and Second Report of the Special Master Received
Apr 8 2009	Reports of the Special Master DISTRIBUTED for Conference of April 24, 2009.
Apr 27 2009	The Reports of the Special Master are received and ordered filed. Exceptions to the Reports, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Sur-reply briefs, if any, may be filed within 30 days.
May 19 2009	The joint request for an extension of time has been granted. Exceptions to the Reports are due on or before June 24, 2009; Amicus Briefs are due on or before July 15, 2009; Replies are due on or before August, 10, 2009; Sur-replies are due on or before September 9, 2009.
Jun 25 2009	Exceptions by Plaintiffs to the Preliminary and Second Reports of The Special Master and Brief in Support of Exceptions filed.
Jun 25 2009	Exceptions of the State of North Carolina to the Reports of the Special Master and Brief in Support of Exceptions filed.
Jul 15 2009	Brief amicus curiae of United States filed.
Jul 15 2009	Brief amici curiae of Rocky Mt Low-Level Radioactive Waste Compact Board, et al., filed.
Aug 10 2009	The State of North Carolina's Reply to Exceptions by Plaintiffs to the Reports of the Special Master filed.
Aug 10 2009	Reply to North Carolina's Exceptions to the Preliminary and Second Reports of the Special Master filed by Alabama, et al.
Aug 17 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 9 2009	Sur-Reply of defendant North Carolina filed.
Sep 9 2009	Sur-Reply of Alabama, et al., Plaintiffs filed.
Sep 16 2009	Motion DISTRIBUTED for Conference of October 9, 2009.
Oct 13 2009	The Exceptions to the Report of the Special Master are set for oral argument in due course.
Oct 22 2009	Joint motion for enlargement of time for oral argument filed by the parties.
Nov 2 2009	SET FOR ARGUMENT ON Monday, January 11, 2010.
Nov 2 2009	CIRCULATED.
Nov 9 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 9 2009	Motion of the parties for enlargement of time for oral argument GRANTED and the time is allocated as follows: 30 minutes for plaintiffs, 10 minutes for the Solicitor General, 40 minutes for defendant, and 10 minutes for plaintiffs.
Dec 22 2009	Record received from Special Master Bradford R. Clark. (4 boxes)
Jan 11 2010	Argued. On Exceptions to the Report of the Special Master. For plaintiffs: Carter G. Phillips, Washington, D.C. For United States as amicus curiae: Edward S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. For defendant, Walter Dellinger, Washington, D.C.

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No. __, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND BILL OF COMPLAINT

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
COLLEEN M. LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for Plaintiffs

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

June 3, 2002

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BILL PRYOR
ATTORNEY GENERAL
Office of the Attorney General
Alabama State House
11 South Union Street
Third Floor
Montgomery, Alabama 36130
(334) 242-7300

BOB BUTTERWORTH
ATTORNEY GENERAL
Office of the Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399
(850) 487-1963

PAUL G SUMMERS
ATTORNEY GENERAL
Office of the Attorney General
P O Box 20207
Nashville, Tennessee 37202
(615) 741-3491

JERRY W KILGORE
ATTORNEY GENERAL
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

Attorneys for Plaintiffs

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IN THE

Supreme Court of the United States

No __, Original

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v

STATE OF NORTH CAROLINA,

Defendant

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Plaintiffs, four of the member States of the Southeast Interstate Low-Level Radioactive Waste Management Compact and the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"), by their undersigned counsel and their respective Attorneys General and pursuant to 28 U.S.C. § 1251(a) and to Rule 17 of the Rules of this Court, move for leave to file their Complaint against the State of North Carolina, for the reasons stated herein.

This is the second motion for leave to file a bill of complaint addressing the dispute among the member States of the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"). This Court denied the initial motion after requesting and receiving from the United States a brief *amicus curiae* that expressed the view that this Court did not have exclusive original jurisdiction

over a suit filed *solely* by the Commission against a member State of the Compact App A 1a-23a The United States also expressed its view that this Court would have exclusive original jurisdiction over an action by "one or more States that are parties to the Compact against another party State to enforce the Compact and seek an appropriate remedy" U S Brief at 18 (citing cases) (App A 21a) This motion seeks leave to file such a suit

INTRODUCTION

In 1980, the United States Congress enacted the Low-Level Radioactive Waste Policy Act, which was amended by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act See Pub L No 96-573, 94 Stat 3347 (1980) and Pub L No 99-240, 99 Stat 1859 (1986) (collectively, the "Federal Acts") The Federal Acts recognized that it is primarily the responsibility of the states to dispose of low-level radioactive waste, and encouraged the states to form regional interstate compacts to develop disposal facilities in an efficient and effective manner The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"), which is both a contract among the member States and a statute, was formally adopted by North Carolina in N C Gen Stat § 104F The legislatures of all the other member States[1] similarly entered into the Compact by enacting enabling legislation On January 15, 1986, as part of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Congress consented to the Compact, thereby making it a federal law Pub L No 99-240, Tit II, 99 Stat 1859 (1986)

When the Compact was enacted, South Carolina already had a disposal facility which could be used by the member

[1] The original party states to the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia Pub L No 99-240, Art 7(A), 99 Stat 1859, 1878 (1986)

States, but was scheduled to close it within several years of the enactment of the Compact Consequently, one of the missions of the Commission that was created by the Compact was to develop criteria and procedures for identifying one of the member States as a host for the next regional disposal facility In September 1986, after a lengthy technical review and screening process by the Commission and outside consultants, North Carolina was designated by the Commission as the next host State North Carolina willingly accepted this designation and commenced efforts to select and license a site North Carolina also willingly accepted significant financial assistance from the Commission Nevertheless, after more than a decade, no disposal facility ever has been licensed, let alone constructed, in and by North Carolina

The language of the Compact is clear that the host State has complete responsibility for site development and that the Commission bears no responsibility to pay the costs associated with building a disposal facility However, at the request of North Carolina and to promote the timely creation of a new facility, the Commission provided nearly $80 million to North Carolina for the purpose of facilitating North Carolina's efforts This money was raised exclusively by levying fees and surcharges on wastes being disposed of at the first regional disposal facility in Barnwell, South Carolina When, in 1995, South Carolina withdrew from the Compact, due in large part to the State's frustration over the inordinate delays encountered with the North Carolina project, the Barnwell facility was no longer available as the regional facility for the Southeast Compact This action had the practical effect of eliminating the Commission's only source of revenue, such that the Commission no longer had funds to assist North Carolina's efforts to license and construct a disposal facility Although not obligated to do so, the Commission made repeated attempts to develop funding alternatives acceptable to North Carolina Rather than

working with the Commission in its attempts to resolve the issue cooperatively, North Carolina erroneously asserted that the Commission was required to continue to provide funding and was in breach by failing to do so Eventually, North Carolina closed down the project when the Commission had no option but to cease sending money to North Carolina

As a consequence of North Carolina's intransigence, Florida and Tennessee filed with the Commission a Sanctions Complaint, alleging that North Carolina was in breach of the Compact and seeking sanctions against North Carolina After notice and a hearing presided over by an impartial administrative law judge at which evidence was taken, the Commission unanimously found that North Carolina was in breach of the Compact As Commissioner Richard Hunter of Florida explained

> North Carolina enjoyed substantial benefits in protecting its public health as a member of this Compact through the years, and when it came time for them to do their part they were unable to meet those obligations in a timely manner and ultimately decided that they would not play

Statement of Commissioner Hunter, December 8, 1999 Sanctions Hearing Transcript (hereinafter "Tr ") at 34-35 (App B 25a) Based on the record evidence demonstrating both breach and the amount of money provided by the Commission to North Carolina, the Commission concluded that North Carolina should disgorge the monies paid by the Commission Accordingly, the Commission ordered North Carolina to repay to the Commission $79,930,337, plus interest from the date North Carolina ceased activities to develop the requisite facility, January 1, 1998 In addition, the Commission ordered North Carolina to pay $10 million for the loss of a source of funds for the Commission's operating budget for a period of 20 years, and attorney's fees North Carolina has defied the Commission's order and refused to pay the sanction

Accordingly, Plaintiffs invoke this Court's exclusive original jurisdiction to vindicate their rights under the Compact and any other rights they may have at common law to recover the money that North Carolina accepted without fulfilling its corresponding duty to create a disposal facility, and to enforce the Sanction Order entered against North Carolina by the Commission

STATEMENT OF THE CASE

A. The Southeast Interstate Low-Level Radioactive Waste Management Compact.

The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was enacted by each State, including North Carolina, see, *e.g.*, N C Gen Stat § 104F (repealed eff July 22, 1999), and subsequently was consented to by the United States Congress on January 15, 1986 as part of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act Compact, Pub L No 99-240, Tit II, 99 Stat 1859 (1986) The original member States in the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia *Id.*, Art 7(A), 99 Stat at 1878

The Compact was enacted in recognition of several policy objectives First, by entering into the Compact, the States "recognize[d] and declare[d] that each state is responsible for providing for the availability of capacity either within or outside the State for disposal of low-level radioactive waste generated within its borders," and that "management of low-level radioactive waste is handled most efficiently on a regional basis" *Id.*, Art 1, 99 Stat at 1871 Further, the States "recognize[d] that the safe and efficient management of low-level radioactive waste generated within the region requires that sufficient capacity to dispose of such waste be properly provided" *Id.* at 1872 In addition, "[i]t is the policy of the party states to enter into a regional low-level

radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort [and for] provid[ing] sufficient facilities for the proper management of low-level radioactive waste generated in the region." *Id.*

The Compact, by its terms, created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission" or "Compact Commission"), consisting of two voting members from each member State, to be appointed according to the laws of each State *Id.*, Art 4(A), 99 Stat at 1874 The first disposal facility serving the member States was the existing low-level radioactive waste disposal facility located in Barnwell County, South Carolina Pub L No 101-171, sec 2, Art 7(H), 103 Stat 1289, 1289 (1989) Among the Commission's duties was to develop and adopt procedures and criteria for identifying a State as a host State for a regional facility and to identify a host State for the development of a second regional disposal facility Compact, Art 4(E)(6), 99 Stat at 1875 Further, the Commission was authorized to ensure that this second regional disposal facility would be licensed and ready to operate as soon as required, but in no event later than 1991 *Id*

The Compact requires that each member State that is designated as a host State must take "appropriate steps" to ensure that an application for a license to construct and operate a facility is filed with and issued by the appropriate regulatory authority *Id*, Art 5(C), 99 Stat at 1877 Further, Article 3(C) states that host States "are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities" *Id.* at 1873-74 Moreover, the Compact expressly states that the Commission is "not responsible for any costs associated with (1) the creation of any facility" *Id.*, Art 4(K), 99 Stat at 1876

The Compact also vests in the Commission the power to revoke the membership of a member State that "willfully

creates barriers to the siting of a needed regional facility." *Id.*, Art 4(E)(7), 99 Stat at 1875 If the Commission resolves to revoke the status of a State as a party to the Compact, it must provide written notice of the action to the Governors, Presidents of the Senates, and Speakers of the Houses of Representatives of the member States, as well as to the chairpersons of the appropriate committees of Congress *Id.*, Art 7(F), 99 Stat at 1879 The Compact further provides for other remedies against recalcitrant member States

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction

Id

B. The Present Controversy.

In September 1986, following a lengthy screening and review process by the Commission and outside consultants, the Commission, by a two-thirds majority vote, selected the State of North Carolina as the second host State The designation of North Carolina as the host State obligated North Carolina to develop and operate a facility to receive the region's low-level radioactive waste for disposal for a period of 20 years As provided in the Compact, North Carolina, as the host State, had the responsibility for financing, siting, licensing and constructing the facility In turn, North Carolina would be repaid for its expenses from revenues generated by the facility, once operational North Carolina acknowledged this financial arrangement by the enactment of N C Gen Stat § 104G-15 (repealed eff July 1, 2000), which

speaks of recovery of the State's costs through the imposition of fees by the operating facility

Following the designation of North Carolina as host State, the North Carolina General Assembly considered, but rejected in August 1987, a bill to withdraw from the Compact Instead, the General Assembly enacted a law developing the siting authority the North Carolina Low-Level Waste Management Authority (the "North Carolina Authority") As further evidence of its recognition of its host State status, North Carolina proposed amendments to the Compact concerning the length of time a disposal facility was required to act as the regional facility and concerning the terms for withdrawing from the Compact The proposed amendments, which made it more difficult for States to withdraw after the second disposal site opened, were adopted by all member States and consented to by Congress Pub L No 101-171, sec 2, 103 Stat at 1289

Although not obligated to do so, see Compact, Art 4(K), 99 Stat at 1876, in response to a request from North Carolina, the Commission determined in 1988 that it was "appropriate and necessary" for it to provide financial assistance to any State designated as the next host State "for the initial planning and administrative costs and other pre-operational costs associated with that state's obligation to create and operate a regional facility" See Feb 9, 1988 Resolution (App C 34a) Accordingly, the Commission voted to appropriate $200,000 in its annual budget to a trust fund for that purpose In total, the Commission provided $1,200,000 to North Carolina through this fund

In December 1988, Governor Campbell of South Carolina notified the Commission that the Barnwell facility would cease to serve as the regional disposal facility on December 31, 1992 Subsequently, in 1989, at North Carolina's request, the Commission adopted a Capacity Assurance Charge on regional waste going to the Barnwell, South Carolina facility to provide funds "[t]o assure the timely development of the

second regional disposal facility in North Carolina " See Oct 24, 1989 Commission Minutes (App D 39a) These funds were intended to support the licensing phase of North Carolina's site development The Commission provided $19,733,816 to North Carolina through the collection of this Capacity Assurance Charge between January 1, 1990 and December 31, 1992

In July 1990, after years of assurances that the January 1, 1993 target date for completion of the construction of the facility was feasible, the North Carolina Authority submitted a revised work plan, which put completion of the project two years behind schedule and nearly doubled the cost, excluding construction costs To assist with the increased costs, the Commission established an Access Fee on regional waste going to the Barnwell, South Carolina facility Once again, these funds were intended for use in the development of the facility in North Carolina See Nov 15, 1990 Commission Minutes at Attach A (App E 51a-52a) A total of $12,012,795 in Access Fees was collected and provided to North Carolina

In October 1991, the North Carolina Authority announced a new siting schedule, with the site's opening set for February 1996 In February 1992, the Commission recommended that the Barnwell facility remain open, provided certain conditions were met, including meeting certain milestones with regard to the development of the North Carolina facility In June 1992, the South Carolina Legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996

In its continued effort to assist North Carolina in developing the much-needed second disposal facility, the Commission implemented an Out-of-Region Access Fee on out-of-region waste going to the Barnwell, South Carolina facility during the period January 1, 1993 through June 30, 1994 See Sept 28, 1992 Commission Minutes at 2-5 (App F 60a-65a) The charge was $220 per cubic foot of out-of-

region waste, with $160 of this fee going to South Carolina and $60 going to the Commission Through the collection of this fee, the Commission provided an additional $23,459,786 to North Carolina for use in connection with the licensing and development of the disposal facility

In addition to the foregoing, at North Carolina's request, the Commission levied $3,000,000 per quarter in access fees on southeast waste generators for the period January 1, 1993 through December 31, 1995 "[i]n order to assure the continued development of the second regional disposal facility for low-level radioactive waste in North Carolina" See Nov 13, 1992 Commission Minutes at 3 (App G 66a) A total of $23,405,699 of this access fee was collected and provided to North Carolina By December 1993, the North Carolina Authority had selected a proposed site in Wake County, North Carolina and had submitted a license application for that site

Next, the Commission granted North Carolina's request for the advancement of money from the Regional Access Fee fund "when necessary on a documentated [sic] basis not to exceed a total of $3 Million" See Apr 29, 1994 Commission Minutes at 6 (App H 68a) In August 1994, the North Carolina Division of Radiation Protection, the State's licensing authority, announced there would be a 15-month delay in the licensing process, thereby further postponing the opening of the North Carolina facility until at least June 1997, assuming no construction or litigation delays In December 1994, the North Carolina Authority approved an additional one-year delay, postponing the opening of the new facility until 1998

By this time, South Carolina leaders were incensed by North Carolina's lack of progress and doubted that North Carolina ever would open the second regional facility. In May 1995, the Commission met twice to consider a South Carolina proposal intended to punish North Carolina for its lack of progress and to create a sense of urgency in North

Carolina to open the disposal facility The proposal would have denied access to Barnwell to North Carolina until North Carolina issued the license for the new facility Because the denial of access for North Carolina was considered a sanction against North Carolina, the vote required a two-thirds majority for approval The Commission voted on South Carolina's proposal twice, and both times the resolution failed by a single vote

Due the lack of assurance that North Carolina ever would open a second regional disposal facility, South Carolina withdrew from the Compact in July 1995 Consequently, the Commission no longer could levy fees and surcharges on waste disposed of at the Barnwell facility This eliminated the traditional source of revenue to fund the Commission's operations, as well as the source of revenue from which the Commission had been providing funds to North Carolina to assist in site development activities See Tr at 54 (App B 27a) (Question (by Mr Jones) "When a source of funding from Barnwell was cut off to the Commission, was there any other major source of funding to the Commission from which funds could be given to the State of North Carolina?" Answer (by Commissioner Mobley) "No We had no other funding other than some interest on our accrued funds "), *id.* at 83-84 (App B 30a) (same)

On January 5, 1996, the Chairman of the Commission, Richard S Hodes, M D , wrote to North Carolina Governor James B Hunt, Jr to explain that the Commission, up to that point in time, had contributed $55 million to North Carolina in furtherance of the facility development project but that additional Commission funds would eventually be unavailable Chairman Hodes encouraged Governor Hunt to begin considering alternative funding opportunities, consistent with North Carolina's obligations under the Compact See Jan 5, 1996 Hodes letter to Hunt at 3 (App I 73a) Chairman Hodes sent several subsequent letters to Governor Hunt reminding him that, by law, the designated

host State is responsible for siting, licensing, building and operating the facility, and that this responsibility includes providing the necessary funding See, *e g.*, Apr 25, 1996 Hodes letter to Hunt (App J 75a-77a), May 10, 1996 Hodes letter to Hunt (App K 78a-79a)

Nevertheless, on June 14, 1996, Governor Hunt informed the Commission that "North Carolina [was] not prepared to assume a greater portion of the project costs If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not be able to proceed " See June 14, 1996 Hunt letter to Hodes at 2 (App L 81a) In taking this position, Governor Hunt ignored the plain language of the Compact, which clearly states the Commission is "not responsible for any costs associated with (1) the creation of any facility " Compact, Art 4(K), 99 Stat at 1876 Neither Governor Hunt nor the North Carolina Authority made a request to the North Carolina General Assembly to appropriate the necessary funds Further, the General Assembly was aware of the problem yet made no effort to provide the funds Nevertheless, the Governor continued to blame delays on the Commission's alleged failure to provide North Carolina with adequate funds See July 18, 1996 Hunt letter to Hodes (App M 82a) (North Carolina requested $4 million necessary to go forward with the project, "If the project is delayed, it will be the result of the Commission turning down the funding request ") Contrary to Governor Hunt's allegations, however, the Commission continued to offer interim funding to North Carolina See July 9, 1996 Hodes letter to Hunt (App N 85a) The fact is that the delays actually were caused by North Carolina itself *E g*, July 18, 1996 Hodes letter to Hunt (App O 86a-87a) For example, in June 1996, the North Carolina Authority adopted a Licensing Work Plan under which the facility would not open until 2001, assuming no construction or litigation delays, for reasons wholly apart from funding issues Implementation of the Licensing Work

Plan alone would have cost an additional $26 million – more than the total amount of funds remaining available to the Commission

Despite the foot-dragging of North Carolina and in a good faith effort to move the licensing and construction project along, the Commission authorized, subject to compliance by North Carolina with five conditions, the release of funds on a quarterly basis to the North Carolina Authority to cover amounts expended by the Authority in performing the licensing work plan developed by the Authority See Oct 3, 1996 Commission Minutes at 2-4 (App P 88a-93a) In order to implement this program, the Commission authorized providing a total of $6 5 million to restart and move forward with the North Carolina project, which had been closed down by the North Carolina Authority in July 1996, allegedly due to a lack of funds

In 1997, the Commission voted to release an additional $2 9 million to the North Carolina Authority, based on the affirmative recommendation of the Authority that it "ma[de] sense to proceed with the project" See Apr 18, 1997 Commission Minutes at 4 (App Q 96a) Subsequently, the Commission voted to approve the North Carolina Authority's request for additional funding up to $1 4 million for the months of August and September Funding beyond the $1 4 million would be considered upon receipt by the Commission of a successful progress report by the North Carolina Department of Environment and Natural Resources See July 22, 1997 Commission Minutes (App R 102a) Finally, in August 1997, the Commission voted to provide interim stop-gap funding to the North Carolina Authority up to $1 2 million See Aug 21, 1997 Commission Minutes at 5 (App S 105a)

Despite the Commission's numerous efforts to resolve (and to urge North Carolina to resolve) the funding problems, no solution was reached Consequently, the Commission organized a Task Force for Facility Funding (the "Task

Force") to study the issue and make recommendations for funding alternatives The Task Force included volunteer representatives of the North Carolina Authority, the Commission, waste generators and the public The Task Force issued a consensus report in May 1997 that included specific recommendations for funding The Commission approved the recommendations in July 1997

A group of regional waste generators developed a draft Memorandum of Understanding ("MOU") that implemented the Task Force's recommendations The Commission transmitted to Governor Hunt the draft MOU in August 1997 See Aug 28, 1997 Hodes letter to Hunt at 1 (App T 106a-107a) Under the proposed MOU, the Commission and volunteer generators would have funded the remainder of the licensing costs in return for certain commitments from North Carolina Upon transmission of the proposed MOU, the Commission asked the North Carolina Authority either to endorse the proposal or to propose an alternative method of funding by December 1, 1997, as a condition of future funding More than two months later, and more than ten years after North Carolina accepted the designation as the next host State, Governor Hunt responded to the Commission by raising several concerns about the proposal, but without making any commitment to proceed absent the Commission "com[ing] up with some approach that provides the relatively few dollars needed to complete *licensing* without jeopardizing the future operation and financing of the facility" Nov 3, 1997 Hunt letter to Hodes at 2 (App U 111a-112a) (emphasis added) Governor Hunt did not accept the Commission's offer to fund the project through the Memorandum of Understanding, nor did he suggest an alternative method of funding

Chairman Hodes responded by, among other things, reiterating that it was "the intent of the compact law to [distribute costs] by obligating each party state, in turn, to develop and operate a facility It has always been the intent

of the law that each host state would be repaid for its expenses from facility revenues" Nov 14, 1997 Hodes letter to Hunt at 2 (App V 116a), see also Tr at 40, 62-63 (App B 26a, 28a) Chairman Hodes also restated the Commission's position that, if an agreement in principle regarding funding could not be reached by December 1, 1997, the Commission would not provide funding for work performed after November 30, 1997 Nov 14, 1997 Hodes letter to Hunt at 2 (App V 116a), see also Tr at 82-84 (App B 29a-31a)

By December 1, 1997, North Carolina had neither endorsed the MOU nor proposed any other funding plan Instead, the Chair of the North Carolina Authority notified the Commission of the Authority's decision to "commence the orderly shutdown of the project" pending instruction from the North Carolina Legislature or the Commission's reversal of its position regarding funding See Dec 19, 1997 Corgan letter to Hodes at 3 (App W 119a) Chairman Corgan stated that it was "North Carolina's view that the Compact Commission and the other member states have failed to honor their commitments under the compact law and made further performance by the Authority impossible" *Id* at 1 (App W 117a) Like Governor Hunt, Chairman Corgan attempted to lay the blame on the Commission for North Carolina's failure to develop a disposal facility in the over eleven years since North Carolina had been designated the next host State "It is extremely unfortunate that the Compact's actions have caused the project to be stopped The Authority has no real choice but to commence a project shutdown given the Compact's unwillingness to spend its existing funds" *Id* at 3 (App W 120a) The Commission notified the North Carolina Authority in January 1998 that the shut down constituted a breach of the Compact by North Carolina

Between January 1998 and April 1999, the Commission participated in efforts to negotiate with the North Carolina Authority to resolve the dispute between North Carolina and

the Commission and the other States in the Compact No satisfactory resolution was reached

On April 26, 1999, Chairman Hodes notified Governor Hunt that the "Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed" with the development of the disposal facility See Apr 26, 1999 Hodes letter to Hunt (App X 124a-125a) Hodes asked that North Carolina provide the Commission with a written plan and schedule for North Carolina to bring itself into compliance with compact law and to provide a disposal facility for the region North Carolina took no action in response

Due to North Carolina's failure to fulfill its obligations, the States in the Compact found themselves without a new regional disposal facility after waiting more than twelve years for North Carolina to develop one During those twelve years, North Carolina enjoyed the benefits of being a member of the Compact, including access to waste management and disposal services and reduced disposal fees Nevertheless, after paying directly or indirectly most of the $80 million provided to North Carolina, the member States had nothing to show for this enormous investment Frustrated and without other recourse, on June 21, 1999, the Commissioners of the States of Florida and Tennessee filed with the Commission a Sanctions Complaint against North Carolina. (App Y 127a-131a) The Sanctions Complaint alleged that North Carolina failed to fulfill its obligations as a member State in the Compact and as the designated host State by not providing a disposal facility for the region Further, the Sanctions Complaint requested, among other things, return of the $79,930,337 in funds the Commission had provided to North Carolina to assist in the licensing and development of the disposal facility, plus interest from the date North Carolina

ceased activities to develop the requisite facility, January 1, 1998

On July 26, 1999, North Carolina purported to exercise its rights under Article 7(G) of the Compact to withdraw from the Compact 1999 N C Sess Laws 357 North Carolina claimed that it "had no option but to" withdraw as a result of the Commission's breach (by terminating supplemental funding as of December 1, 1997) of the Compact See Dec 1, 1999 Easley letter to Hodes at 1 (App Z 133a)

In August 1999, the Commission adopted the recommendation of the Sanctions Committee to initiate a formal inquiry into the complaint filed against North Carolina On November 8, 1999, the Commission provided North Carolina with formal notice of a sanctions hearing to be held on December 8, 1999 See Nov 8, 1999 Haynes letter to Hunt (App AA 135a-136a) Attorney General Easley mistakenly asserted that having withdrawn from the Compact, North Carolina no longer was subject to the jurisdiction of the Commission Further, he claimed that the Commission lacked authority to conduct a sanctions proceeding against a State that had voluntarily withdrawn from the Compact See Dec 1, 1999 Easley letter to Hodes at 2 (App Z 133a) Finally, Mr Easley informed Chairman Hodes that North Carolina would not participate in the sanctions proceeding and would "vigorously oppose any effort by the Commission to impose sanctions or retain further jurisdiction" over the State *Id.* (App Z 133a-134a)

The Commission held a Sanctions Hearing on December 8, 1999 The Commission heard testimony and received documentary evidence from the States of Florida and Tennessee All of the Commissioners were permitted to ask questions and make comments Comments also were received from members of the public In addition, North Carolina, which had a representative present at the hearing, again was provided the opportunity to offer any testimony or

other evidence on its behalf North Carolina steadfastly chose not to exercise its rights under the Compact to defend itself

By a unanimous vote, the Commission found that North Carolina had failed to fulfill its obligations under the Compact Consequently, the Commission voted to require North Carolina to repay the $79,930,337 in funds it had received from the Commission for use in licensing and developing a disposal facility, plus interest from January 1, 1998, the date North Carolina ceased activities to develop the requisite facility The Commission also voted to require North Carolina to pay $10 million for the loss of the source of funds the facility would have provided to the Commission's operating budget for 20 years, and the Commission's attorneys' fees North Carolina was given until July 10, 2000 to comply with this order See Dec 9, 1999 Resolution (App BB 137a-138a) Immediately following the announcement of the Commission's decision, the North Carolina Attorney General stated in a press release that North Carolina would not repay the funds See Dec 9, 1999 Press Release (App CC 139a-140a)

The deadline for North Carolina to comply with the order passed with no action As a result, on July 10, 2000, the Commission, on behalf of the remaining member States (with the exception of North Carolina), moved for leave of this Court to file a bill of complaint against the State of North Carolina The Commission asked the Court to exercise its original jurisdiction over the dispute based on a provision of the Compact which vests the Commission with authority to stand in the shoes of the member States in litigation before any court Compact, Art 4(E)(10), 99 Stat at 1875 In September 2000, North Carolina filed its Brief in Opposition to the Commission's motion, arguing primarily that the case was not appropriate for the exercise of original jurisdiction because the Commission is not a state

In October 2000, this Court invited the views of the Solicitor General regarding the Commission's suit against

North Carolina On May 30, 2001, the Acting Solicitor General responded to the Court's request by filing a Brief as Amicus Curiae, asserting that the Commission is not a State and that it is unclear whether Congress may permissibly authorize an entity created by an interstate compact to invoke the Court's original jurisdiction on behalf of its member States The brief did point out that the absence "of original jurisdiction over a suit by the Commission would not preclude one or more States that are parties to the Compact from bringing an original action under 28 U S C 1251(a) against another party State to enforce the Compact and seek an appropriate remedy" U S Brief at 17-18 (App A 21a)

In June 2001, this Court denied the Commission leave to file its bill of complaint without addressing the merits of the complaint

'Since June 2001, North Carolina has taken no steps to resolve matters with the Commission or the States The gravity of the situation has not changed, however, for the States that are members of the Compact The States remain without a regional disposal facility Currently, waste generators from the member States send their waste either to Barnwell, South Carolina or to a facility in Utah The Barnwell facility is scheduled to close to all waste generators outside of the Atlantic Compact region in 2008, and is scaling back on the amount of out-of-region waste it will accept each year until then The facility in Utah currently accepts only limited types of low-level radioactive waste The problem is apparent – the member States are gradually running out of alternatives for disposing of their waste and need funds to enhance their ability to secure new disposal alternatives

Consequently, the States of Alabama, Florida and Tennessee and the Commonwealth of Virginia, along with the Commission, have accepted the implicit invitation of the United States to file an original action against North Carolina pursuant to 28 U S C § 1251(a), see U S Brief at 17-18 (App A 21a) They bring this action against North Carolina

to enforce the Compact or otherwise to obtain redress for North Carolina's wrongful conduct

REASONS THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

This case involves a dispute among North Carolina, on the one hand, and the remaining member States and the Commission, on the other At issue is the proper interpretation and enforcement of the Compact's requirements Plaintiffs urge this Court, *inter alia,* to determine under the Compact (1) whether the imposition of the sanctions in this case, including the disgorgement of the $79,930,337 provided to North Carolina to license and develop a regional disposal facility that was never licensed, let alone completed, was a valid exercise of the Commission's sanction authority, as set forth in Article 4(F) of the Compact, and (2) whether North Carolina is obligated to comply with the Sanctions Order issued by the Commission, including repaying to the Commission $79,930,337 plus interest Having previously recognized its exclusive original jurisdiction to resolve disputes among sovereign states arising under compact laws, this Court is uniquely competent to interpret the relevant interstate compact provisions

Action by this Court is particularly warranted because serious public health concerns are at stake in this dispute The States belonging to the Compact have been without a regional disposal facility since 1995, when South Carolina withdrew from the Compact in frustration over North Carolina's steadfast failure to develop a disposal facility Moreover, since 1995, the Commission has been without any means of raising the significant funds needed to obtain disposal capacity or to fund Commission operations The States and generators must either find a way to store their radioactive wastes at hundreds of locations throughout the region or discontinue the activities that generate the waste As a result, the objectives of Congress in enacting the Low-

Level Radioactive Waste Policy Act have been thwarted and there exists a serious threat to the public health and safety the longer this region remains without a regional disposal facility

Critically, too, this case is not susceptible to expeditious, impartial resolution in any other forum This Court has exclusive original jurisdiction over controversies among states The Compact establishes the authority of the Commission to impose sanctions against member States that fail to fulfill their obligations under the Compact, Compact, Art 7(F), 99 Stat at 1879, but does not provide for judicial review of such sanctions determinations Accordingly, where disputes about sanctions arise between member States of the Compact, the resolution of those disputes necessarily falls to this Court See *Texas* v *New Mexico*, 462 U S 554, 569-70 (1983), see also *Kansas* v *Colorado*, 514 U S 673 (1995)

Specifically here, Florida and Tennessee pursued the only mechanism expressly available to them, *viz.*, a sanctions hearing before the Commission against North Carolina North Carolina was provided with formal notice and a full opportunity to be heard [2] A hearing was presided over by an experienced, impartial officer who was a retired state court judge Testimony was heard, documentary evidence was received, and the decision to impose sanctions, including restitution, was unanimously approved by the Commission North Carolina, despite two invitations to participate in the proceeding and present evidence on its behalf,[3] opted not to participate in the Sanctions Hearing

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[2] North Carolina was served with notice by certified mail Nov 8, 1999 Haynes letter to Hunt (App AA 135a) Receipt of notice was acknowledged by the Attorney General of North Carolina *See* Dec 1, 1999 Easley letter to Hodes at 1 (App Z 132a)

[3] North Carolina, which had a representative present at the Sanctions Hearing, again was urged to present evidence at the Hearing itself *See* Tr at 93 (App B 32a-33a)

At a fundamental level, North Carolina's attempt to shirk the responsibilities it voluntarily assumed by becoming a member of the Compact would have a chilling effect on other states in similar situations if North Carolina were permitted to succeed As Commissioner Charles Hawkins of Virginia noted during the Sanctions Hearing

> If compacts have no more validity than this one does, and being able to withdraw at a time that you feel is to your convenience, the whole concept falls apart This goes beyond this compact, this goes beyond this group of states, this goes into the arena of what we can depend on as we enter into agreements among consenting states for the betterment of our citizens
>
> [I]f something is not in place to bring some sort of stability to the commitments made, no state, no general assembly will be willing to go on record to support any other compact with their moneys or their time or their efforts, knowing full well that at any point during the process, a state can withdraw based on the whim of that particular legislative body And that's no way to build agreements

Tr at 91-92 (App B 31a-32a) Commissioner Hawkins' concerns were shared by Alternate Commissioner A C McNeer of Virginia

> [I]f we don't resolve this issue here, it has national implications and, for the future of the compact system itself, I think we have to resolve it in a responsible way or we're inviting trouble

Id. at 92 (App B 32a) The Commission did just that, within the bounds of its contractual and statutorily created authority, and its decision should be upheld and enforced

Because North Carolina has refused to comply with its obligations and with the Sanctions Order, Plaintiffs must seek judicial relief to declare the Sanctions Order valid and to

enforce the Commission's action The circumstances of this case, in which a super-majority of the member States have imposed a sanction on another State, pursuant to the method agreed upon by the States at the time of ratification of the Compact, warrant the exercise of this Court's exclusive original jurisdiction Were this Court to decline to exercise jurisdiction, the sanctions mechanism provided for in the Compact would be rendered useless and the member States would be without an alternative forum in which to enforce their claims Plainly this was not the intent of the parties or Congress, and this Court is the appropriate institution to protect those expectations

ARGUMENT

This Court traditionally has considered two factors in determining whether to exercise its original jurisdiction under Article III, Section 2 of the United States Constitution,[4] and 28 U S C § 1251(a)

> Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors First, we look to the "nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim" Second, we explore the availability of an alternative forum in which the issue tendered can be resolved

Mississippi v *Louisiana*, 506 U S 73, 77 (1992) (citations omitted) Significantly, the Court rarely has declined to exercise its original jurisdiction in a case such as this one, which involves a dispute among sovereign states concerning the interpretation and enforcement of an interstate compact See, *e.g.*, *Texas* v *New Mexico*, 462 U S 554, 567-68 (1983) ("If there is a compact, it is a law of the United States, and

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[4] "In all Cases in which a State shall be a Party, the supreme Court shall have original Jurisdiction" U S Const art III § 2, cl 2

our first and last order of business is interpreting the compact ") (citation omitted)

A. The Nature Of The States' Interest Is Of Sufficient "Seriousness And Dignity" To Warrant The Court's Exercise Of Original Jurisdiction.

Resolution of a fundamental and irreconcilable difference among the States concerning the proper interpretation of an interstate compact is the archetypical matter warranting the Court's exercise of its exclusive, original jurisdiction This Court consistently has recognized its "'serious responsibility to adjudicate cases where there are actual, existing controversies' between the States" *Oklahoma* v *New Mexico*, 501 U S 221, 241 (1991) (quoting *Arizona* v *California*, 373 U S 546, 564 (1963))

Here, the Compact was enacted by eight States and consented to by Congress for the express purpose of "promot[ing] the health and safety of the region" Compact, Art 1, 99 Stat at 1872 Since South Carolina withdrew from the Compact in 1995 due to North Carolina's failure to develop the next regional disposal facility, the member States have been without a regional facility Without the requisite funds to obtain disposal capacity, the Compact faces the "prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive material due to the lack of disposal facility" Tr at 13 (App B 24a) Thus, the States' attempt to provide for the safe and efficient disposal of low-level radioactive waste for the region was prevented by the actions and failures to act of North Carolina These acts and omissions violated North Carolina's obligations under the Compact in two ways first, by failing to perform its contractual duties as the designated second host State, and second, by failing to comply with the Sanctions Order validly issued against it

By signing on to the Compact, North Carolina agreed to accept a designation as a host State It also formally accepted the designation by enacting N C Gen Stat §§ 104F and 104G and by appropriating funds for site development That designation carried with it the responsibility of funding, licensing, developing and operating a regional disposal facility for 20 years In return, North Carolina would have been repaid fully for its expenses from the revenue generated by the facility Moreover, subsequent facilities would have been sited in other States, ensuring North Carolina's ability to have a safe and convenient location for disposing of its low-level radioactive waste for generations to come

North Carolina refused to honor this arrangement or to accept its manifest responsibility for the project Although for years the Commission provided funds to North Carolina to assist with the project, when the Commission's source of revenue was eliminated and the Commission no longer could contribute to the project, North Carolina refused to cooperate with the Commission and others to find alternative funding sources Instead, North Carolina terminated the project, thereby disavowing its statutory, contractual and equitable obligations to serve as the next host State under the Compact

Second, North Carolina has refused to comply with the Sanctions Order imposed by the Commission following a full and fair hearing In fact, North Carolina refused entirely to participate in the Sanctions Hearing, claiming that it no longer was subject to the jurisdiction of the Commission, having announced its intention to withdraw from the Compact in July 1999 North Carolina is mistaken Although North Carolina enacted legislation with the intent to withdraw from the Compact in July 1999, its preexisting obligations under the Compact did not cease until either the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction See Compact, Art 7(F), 99 Stat at 1879 Therefore, the Commission retained plenary authority to impose the sanction at issue here, having found

after a full and fair hearing that North Carolina failed to fulfill its obligations both under and arising out of the Compact In sum, North Carolina has refused without justification to comply with the Commission's Sanction Order

North Carolina's actions have left the remaining member States in a precarious position vis-à-vis the disposal of low-level radioactive waste and have exposed the states to potentially serious threats to the public health and safety of their citizens As this Court explained in *Missouri* v *Illinois*, 180 U S 208, 241 (1901), in instances in which "the health and comfort of the inhabitants of a State are threatened," the State must be allowed a remedy And given that "[d]iplomatic powers and the right to make war hav[e] been surrendered to the general government," the remedy must be found in the constitutional provision of original jurisdiction in this Court *Id.* As Commissioner Mobley of Tennessee noted during the Sanctions Hearing, "nothing can reclaim the time that has been lost" Tr at 13 (App B 24a) However, this Court's timely and appropriate exercise of original jurisdiction to resolve the dispute will help mitigate the greater problems looming ahead for the member States if this matter is not resolved expeditiously

B. The States Have No Adequate Alternative Forum For Resolving Their Dispute With Another Sovereign State.

This Court has exclusive subject matter jurisdiction over suits among States 28 U S C § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States") Indeed, the United States expressly recognized that a suit by a member State of the Compact against another member State "to enforce the Compact and seek an appropriate remedy" would fall within this Court's exclusive original jurisdiction U S Brief at 18 (App A 21a) See *supra* at 19

Moreover, this Court is the only forum in which the States are guaranteed to receive a fair and impartial ruling as to the proper interpretation and enforcement of the Compact that regulates the relevant relationship among them As the Court stated in *West Virginia ex rel. Dyer* v *Sims*, 341 U S 22 (1951)

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States can be unilaterally nullified, or given final meaning by an organ of one of the contracting States A State cannot be its own ultimate judge in a controversy with a sister State To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies, is the function and duty of the Supreme Court of the Nation

Id at 28 (citation omitted)

Plaintiffs came to this Court only after their failed attempt to resolve this dispute through the Congressionally-approved mechanism set forth in the Compact There is no pending proceeding on this matter in any other jurisdiction, nor is there another jurisdiction available in which a State would not be "its own ultimate judge in a controversy with a sister State" *Id* Requiring Plaintiffs to submit the determination of their compact claims to a North Carolina court, or any other lower federal or state court, is inconsistent with one of the central purposes of this Court's original jurisdiction "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own" *Ohio* v *Wyandotte Chems. Corp*, 401 U S 493, 500 (1971) (citing *Chisholm* v *Georgia*, 2 U S (2 Dall) 419, 475-76 (1793)) Moreover, requiring the parties to litigate this dispute elsewhere will result only in delay and expense This matter ultimately would return to this Court, but only years and many hundreds of thousands of

dollars later – time and money the Commission and the States do not have to spare This problem is particularly acute given that the States are subject to ongoing injury and the threat of even greater harm until this matter is resolved and the member States are able to obtain the disposal capacity North Carolina solemnly undertook to develop but failed to construct, even after the Commission provided almost $80 million to assist North Carolina in those efforts

CONCLUSION

The Court should grant Plaintiffs' motion for leave to file the Complaint Plaintiffs further request that the Court order North Carolina to show cause why the Compact Commission's sanction decision should not be summarily affirmed and enforced

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL
Office of the Attorney General
Alabama State House
11 South Union Street
Third Floor
Montgomery, Alabama 36130
(334) 242-7300

CARTER G PHILLIPS*
VIRGINIA A SEITZ
COLLEEN M LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N W
Washington, D C 20005
(202) 736-8000

BOB BUTTERWORTH
ATTORNEY GENERAL
Office of the Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399
(850) 487-1963

PAUL G SUMMERS
ATTORNEY GENERAL
Office of the Attorney General
P O Box 20207
Nashville, Tennessee 37202
(615) 741-3491

JERRY W KILGORE
ATTORNEY GENERAL
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

Attorneys for Plaintiffs

June 3, 2002

* Counsel of Record

IN THE

Supreme Court of the United States

No __, Original

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v

STATE OF NORTH CAROLINA,

Defendant

BILL OF COMPLAINT

1 The States of Alabama, Florida, and Tennessee, the Commonwealth of Virginia and the Southeast Interstate Low-Level Radioactive Waste Management Commission, by and through undersigned counsel and their respective Attorneys General, for their Complaint against the State of North Carolina allege as follows

PARTIES

2 The State of Alabama is a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact The Compact was codified by the legislature of Alabama at Ala Code § 22-32-1 The filing of this Complaint has been authorized by Attorney General Bill Pryor pursuant to Ala Code § 36-15-12

3 The State of Florida is a member of the Southeast Interstate Low-Level Radioactive Waste Management

Compact The Compact was codified by the legislature of Florida at Fla Stat Ann § 404 30 The filing of this Complaint has been authorized by Attorney General Bob Butterworth

4 The State of Tennessee is a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact The Compact was codified by the legislature of Florida at Tenn Code Ann § 68-202-701 The filing of this Complaint has been authorized by Attorney General Paul G Summers

5 The Commonwealth of Virginia is a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact The Compact was codified by the legislature of Virginia at Va Code Ann § 10 1-1500 The filing of this Complaint has been authorized by Attorney General Jerry Kilgore

6 The Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission" or the "Compact Commission") was created by statute to, among other things, administer the Southeast Interstate Low-Level Radioactive Waste Management Compact Pub L No 99-240, Tit II, 99 Stat 1859 (1986) (hereinafter cited as "Compact") By statute, the Commission was delegated the authority to "act or appear on behalf of any state or states before Congress, state legislatures, [and] any court of law" *Id.*, Art 4(E)(10), 99 Stat at 1875

7 The State of North Carolina has been a party to the Southeast Interstate Low-Level Radioactive Waste Management Compact The Compact was codified by the legislature of North Carolina at N C Gen Stat § 104F (repealed eff July 22, 1999)

JURISDICTION

8 This Court has exclusive original jurisdiction over this Complaint pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U S C § 1251(a)

SUMMARY

9 This action is brought by the States of Alabama, Florida, and Tennessee, the Commonwealth of Virginia and the Commission for violation of the member States' rights under the Compact, breach of contract, unjust enrichment, promissory estoppel and money had and received against the State of North Carolina North Carolina was a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact and properly was designated as the next host State for the construction of a low-level radioactive waste disposal facility In order to ensure that North Carolina would locate an appropriate site and construct an adequate facility, the Commission provided nearly $80 million to North Carolina Over the course of more than ten years, North Carolina accepted the funds, conducted some preliminary search and analysis efforts to locate an appropriate site, but never even issued the necessary license for the project, let alone completed construction of the facility The other member States to the Compact were harmed not only by the fact that they found themselves without a site within their region at which to dispose of low-level radioactive waste, but also because close to $80 million of the Commission's funds were converted by North Carolina without North Carolina fulfilling its obligations undertaken pursuant to the Compact

FACTUAL BACKGROUND

10 The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was consented to by the United States Congress on January 15, 1986, as part of the Omnibus Low-Level Radioactive Waste Compact

Consent Act Pub L No 99-240, Tit II, 99 Stat 1859 (1986)

11 The original member States to the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia

12 The Compact was designed to provide "the instrument and framework for a cooperative effort" to provide sufficient facilities for the proper management of low-level radioactive waste generated in the region

13 To assist in the implementation of the Compact's objectives, the Compact, by its terms, created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"), consisting of two voting members from each member State

14 Among the Commission's duties was to identify a host State for the development of the second regional disposal facility The first regional disposal facility was the pre-existing facility located in Barnwell County, South Carolina Pub L No 101-171, sec 2, Art 7(H), 103 Stat 1289, 1289 (1989)

15 The Compact requires that each member State designated as a host State take appropriate steps to finance, site, license and construct the necessary disposal facility

16 The Compact expressly states that the Commission "is not responsible for any costs associated with (1) the creation of any facility" Compact, Art 4(K), 99 Stat at 1876

17 The Compact also vests in the Commission the power to impose sanctions upon member States that fail to comply with the provisions of the Compact or that fail to fulfill the obligations incurred by becoming a member State to the Compact Compact, Art 7(F), 99 Stat at 1879

THE PRESENT CONTROVERSY

18 In September 1986, following a lengthy screening and review process by the Commission and outside consultants, North Carolina was designated as the second host State

19 In August 1987, the North Carolina General Assembly formally acknowledged acceptance of this designation by creating and funding the siting authority for the project the North Carolina Low-Level Radioactive Waste Management Authority (the "North Carolina Authority") N C Gen Stat § 104G (repealed eff July 1, 2000) The facility North Carolina was to build was targeted to be completed by January 1, 1993

20 Although not obligated to do so, the Commission determined in 1988 that it was prudent for it to provide financial assistance to the designated host State – North Carolina – to assist with planning and administrative costs Accordingly, the Commission voted to appropriate $200,000 in its annual budget to a trust fund for that purpose In total, the Commission provided $1,200,000 to North Carolina through this fund

21 In December 1988, Governor Campbell of South Carolina notified the Commission that the Barnwell facility would cease to serve as the regional disposal facility on December 31, 1992

22 In 1989, at North Carolina's request, the Commission adopted a Capacity Assurance Charge on regional waste going to Barnwell to provide funds to "assure the timely development of the second regional disposal facility in North Carolina" by supporting the licensing phase of the project The Commission provided $19,733,816 to North Carolina through the collection of this Capacity Assurance Charge between January 1, 1990 and December 31, 1992

23 In July 1990, the North Carolina Authority notified the Commission that it would not meet the January 1, 1993

scheduled opening date for the facility Instead, completion of the project was estimated to take an additional two years and cost close to twice as much to complete

24 To assist with these alleged increased costs, the Commission established an Access Fee on regional waste going to the Barnwell facility The Commission provided $12,012,795 to North Carolina through collection of these fees

25 In October 1991, the North Carolina Authority notified the Commission that it would not meet its revised target date for opening the facility Instead, the site was scheduled to open in February 1996

26 In June 1992, at the request of the Commission, which was prompted by delays with the North Carolina facility, the South Carolina legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996

27 In September 1992, the Commission adopted an Out-of-Region Access Fee on out-of-region waste going to the Barnwell facility during the January 1, 1993 through June 30, 1994 period A total of $23,459,786 was provided to North Carolina through the collection of these fees

28 In November 1992, at North Carolina's request, the Commission agreed to levy $3,000,000 per quarter in access fees on southeast waste generators for the period January 1, 1993 through December 31, 1995 A total of $23,405,699 of this fee was provided to North Carolina

29 In April 1994, the Commission granted North Carolina's request for the advancement of funds from the Regional Access Fee fund "when necessary on a documentated [sic] basis not to exceed a total of $3 Million" See Apr 29, 1994 Commission Minutes at 6 (App H 68a)

30 Also in April 1994, the Commission approved the transfer of up to $7 million in additional funds to North Carolina on an as-needed basis

31 In August 1994, the North Carolina Division of Radiation Protection, the State entity responsible for issuing the license for the disposal facility, announced there would be a 15-month delay in the licensing process, further postponing the scheduled opening of the facility until at least June 1997

32 In December 1994, the North Carolina Authority approved an additional one-year delay, postponing the scheduled opening until June 1998

33 In May 1995, the Commission met twice to consider a South Carolina proposal intended to punish North Carolina for its lack of progress and to create a sense of urgency to open the disposal facility The proposal would have denied access to Barnwell for North Carolina's waste until North Carolina issued a license for the new facility The proposal was voted upon twice, and each time failed by a single vote

34 In July 1995, South Carolina withdrew from the Compact

35 South Carolina's withdrawal from the Compact eliminated the Commission's principal source of revenue to fund its operations as well as site development activities – the levying of fees and surcharges on waste disposed of at the Barnwell facility The Commission's only remaining source of funding was interest on its accrued funds

36 Because the Commission no longer had a revenue stream from which to provide funding assistance to North Carolina and because the projected expenses to complete the project exceeded the Commission's remaining funds, the Commission notified North Carolina in January 1996 that North Carolina should consider alternative funding opportunities for completing the project

37 In June 1996, Governor James B Hunt, Jr of North Carolina informed the Commission that North Carolina would not fulfill its existing commitment to pay the project costs Governor Hunt attempted to put the burden on the Commission, contrary to the clear language of the Compact, to fund the project

38 In June 1996, the North Carolina Authority adopted a Licensing Work Plan under which the facility would not open until at least 2001

39 In October 1996, in a good faith effort to move the North Carolina project along, the Commission authorized the release of funds to North Carolina on a quarterly basis, subject to North Carolina's compliance with certain conditions To implement this plan, the Commission authorized providing a total of $6 5 million to North Carolina to restart and move forward with the project, which had been closed down by the North Carolina Authority in July 1996, allegedly due to a lack of funds

40 In April 1997, the Commission voted to release an additional $2 9 million to North Carolina

41 Also in 1997, the Commission approved North Carolina's request for up to $1 4 million for the months of August and September

42 In August 1997, the Commission voted to provide interim stop-gap funding to North Carolina up to $1 2 million

43 In 1997, because other attempts to resolve the funding problem had failed, the Commission organized a Task Force for Facility Funding (the "Task Force") to study the funding issue and recommend funding alternatives The Task Force included volunteer representatives of the North Carolina Authority, the Commission, waste generators and the public

44 In August 1997, the Commission submitted to Governor Hunt a proposed Memorandum of Understanding that had been drafted by waste generators based upon the

recommendations of the Task Force The proposal called for the Commission and volunteer generators to fund the remainder of the licensing costs The Commission asked the North Carolina Authority either to approve the proposal or to propose any other method of funding by December 1, 1997, or the Commission would cease providing funding to North Carolina

45 By December 1, 1997, North Carolina had neither endorsed the proposal nor proposed an alternative funding plan Instead, on or about December 19, 1996, the Chairman of the North Carolina Authority notified the Commission of the Authority's decision to begin shutting down the project pending instructions from the North Carolina Legislature or the Commission's reversal of its position regarding funding

46 In January 1998, the Commission notified the North Carolina Authority that the shut down constituted a breach of the Compact by North Carolina

47 Between January 1998 and April 1999, the Commission engaged in formal mediation with the State of North Carolina in an attempt to resolve matters, but no resolution was reached

48 In April 1999, the Commission again notified North Carolina that it was in breach of the Compact and requested that North Carolina provide a written plan and schedule for North Carolina to bring itself into compliance with the Compact and to provide a disposal facility for the region North Carolina did nothing

49 In June 1999, the States of Florida and Tennessee filed a Sanctions Complaint against North Carolina with the Commission The Sanctions Complaint alleged that North Carolina had failed to fulfill its obligations as a member State and as the designated host State by not providing a disposal facility for the region The Sanctions Complaint sought, among other things, the disgorgement of the $79,930,337 that the Commission had provided to North Carolina to assist in

the licensing and development of the disposal facility, plus interest from the date North Carolina ceased activity to develop the requisite facility, January 1, 1998

50 In July 1999, North Carolina purported to withdraw from the Compact, pursuant to Article 7(G)

51 In August 1999, the Commission approved the recommendation of the Sanctions Committee to initiate a formal inquiry into the complaint filed against North Carolina

52 On November 8, 1999, the Commission formally notified North Carolina of the Sanctions Hearing to be held on December 8, 1999

53 On December 1, 1999, the Attorney General of North Carolina, Michael F Easley, informed the Commission that North Carolina would not participate in the Sanctions Hearing, taking the position that having withdrawn from the Compact, North Carolina no longer was subject to the jurisdiction of the Commission North Carolina effectively waived its rights under the Compact

54 The Commission held a Sanctions Hearing on December 8, 1999 The Commission heard testimony and received evidence from all interested parties, except for North Carolina, which persisted in its refusal to participate in the process and thus knowingly waived its rights

55 On December 9, 1999, by a unanimous vote, the Commission found that North Carolina had failed to fulfill its obligations under the Compact and voted to require North Carolina to repay the $79,930,337 in funds it had received from the Commission, plus interest from the date North Carolina ceased activities to develop the requisite facility, January 1, 1998 The Commission also voted to require North Carolina to pay $10 million in sanctions, as compensation for the loss of a source of funds for the Commission's operating budget for 20 years, and attorneys'

fees North Carolina was given until July 10, 2000 to comply with this order

56 The July 10, 2000 deadline passed North Carolina neither repaid the funds nor gave the Commission any indication of its intent to do so

57 On July 10, 2000 the Commission moved this Court for leave to file a Bill of Complaint against North Carolina

58 On September 11, 2000, North Carolina filed its Opposition to the Commission's motion

59 In October 2000, the Court sought, and in May 2001 received, the view of the Solicitor General on the Commission's motion The Acting Solicitor General took the position that the Commission was not a State and that it was unclear whether Congress could properly authorize a Compact-created entity to invoke this Court's original jurisdiction on behalf of the Compact's member States The brief for the United States did expressly indicate that an action brought by any of the States to enforce the Compact would be an appropriate case for this Court to exercise its exclusive original jurisdiction

60 In June 2001, this Court denied the Commission's Motion for Leave to File a Bill of Complaint

61 North Carolina's actions and failures to act violate North Carolina's obligations under the Compact and otherwise create common law rights for return of the monies paid to North Carolina

COUNT I – VIOLATION OF MEMBER STATES' RIGHTS UNDER THE COMPACT

62 Plaintiffs hereby reallege Paragraphs 1 through 59 as if fully set forth herein

63 As alleged, the Compact is an agreement among the States that has the force of federal law The Compact

imposes an express statutory obligation on the member States to fulfill their obligations to fund, construct and operate a regional disposal facility when such State is designated as the host State

64 North Carolina was designated as the host State, but failed to fund, license, construct or operate a regional disposal facility North Carolina's actions constitute a violation of the member States' rights under the Compact

65 As a result of North Carolina's violation of its obligations under the Compact, Plaintiffs have suffered and will suffer significant monetary damages, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget

COUNT II - BREACH OF CONTRACT

66 Plaintiffs hereby reallege Paragraphs 1 through 63 as if fully set forth herein

67 As alleged, the Compact is a federal law and is a legally binding and enforceable contract

68 Under the contract, North Carolina was obligated, as the designated second host State, to site, license, construct and operate a regional low-level radioactive waste disposal facility

69 The allegations contained hereinbefore constitute breaches of said contract by North Carolina

70 As a direct result of these breaches, Plaintiffs have suffered and will suffer substantial monetary damages, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget

COUNT III – UNJUST ENRICHMENT

71 Plaintiffs hereby reallege Paragraphs 1 through 68 as if fully set forth herein

72 North Carolina received close to $80 million from the Commission to be used for the licensing and development of the next regional disposal facility

73 North Carolina acknowledged the funds received from the Commission, and even repeatedly demanded that the Commission provide additional funds

74 North Carolina has retained the nearly $80 million it received from the Commission, despite the fact that North Carolina failed to deliver the regional disposal facility it was obligated as the next host State to provide

75 As a result, North Carolina has been unjustly enriched in an amount equal to $79,930,337 and should be ordered to pay this amount in restitution to Plaintiffs

COUNT IV – PROMISSORY ESTOPPEL

76 Plaintiffs hereby reallege Paragraphs 1 through 73 as if fully set forth herein

77 As alleged, North Carolina accepted the designation of host State and through its governors repeatedly confirmed that it would provide a facility, thereby promising the other member States that it would construct and operate a regional disposal facility in North Carolina

78 Plaintiffs reasonably and foreseeably relied upon North Carolina's promise to construct and operate a regional disposal facility

79 North Carolina unjustifiably failed to construct and operate a regional disposal facility

80 Plaintiffs have suffered and will suffer significant harm as a result of their reliance on North Carolina's promise,

including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget

COUNT V – MONEY HAD AND RECEIVED

81 Plaintiffs hereby reallege Paragraphs 1 through 78 as if fully set forth herein

82 As alleged, North Carolina has received $79,930,337 from the Commission

83 These funds were intended to further the completion of the construction of a regional disposal facility in North Carolina

84 The regional disposal facility in North Carolina never was constructed

85 North Carolina has retained the $79,930,337 from the Commission, in exchange for which the Commission has received nothing

86 North Carolina, in equity and good conscience, should pay over to the Commission $79,930,337

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court

1 Declare that North Carolina is subject to the jurisdiction of the Commission and subject to the Commission's sanctions decisions, despite North Carolina's purported attempt to withdraw from the Compact on July 26, 1999

2 Declare that the Sanctions Hearing conducted by the Commission was fair and valid

3 Declare that the sanctions against North Carolina imposed by the Commission upon receipt of all evidence in

the Sanctions Hearing were fair and reasonable and are subject to enforcement

4 Award Plaintiffs such damages, costs and further relief as this Court deems just and proper

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL
Office of the Attorney General
Alabama State House
11 South Union Street
Third Floor
Montgomery, Alabama 36130
(334) 242-7300

CARTER G PHILLIPS*
VIRGINIA A SEITZ
COLLEEN M LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N W
Washington, D C 20005
(202) 736-8000

BOB BUTTERWORTH
ATTORNEY GENERAL
Office of the Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399
(850) 487-1963

PAUL G SUMMERS
ATTORNEY GENERAL
Office of the Attorney General
P O Box 20207
Nashville, Tennessee 37202
(615) 741-3491

JERRY W KILGORE
ATTORNEY GENERAL
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

Attorneys for Plaintiffs

June 3, 2002

* Counsel of Record

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APPENDIX A

No. 131, Original

In the Supreme Court of the United States

SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION, PLAINTIFF

v.

STATE OF NORTH CAROLINA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

MARK B. STERN
MICHAEL S. RAAB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether this Court has, and should exercise, exclusive original jurisdiction, under 28 U.S.C. 1251(a), over a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission, a body created by an interstate compact and consisting of representatives of several States, against one of the States that is a party to the compact.

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1. The Compact Clause of the Constitution provides that "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State." U.S. Const Art. 1, § 10, Cl. 3. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978). Congress has enacted legislation consenting to the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact) and a number of other regional compacts for the disposal of low-level nuclear waste. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859; see generally *New York* v. *United States*, 505 U.S. 144, 149-154 (1992); U.S. Br. at 2-15, *New York* v. *United States*, *supra* (No. 91-543). The Southeast Compact is an agreement originally among the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Compact, Art. 7(A), 99 Stat 1878 (Br. in Opp. (Opp.) App. 21a). Each State enacted legislation enabling it to enter into the Compact. *E.g.*, N.C. Gen. Stat. § 104F-1 (1998) (repealed effective July 22, 1999).

The States entered into the Compact for the purpose of, *inter alia*, creating "the instrument and framework for a cooperative effort" to "provide sufficient facilities for the proper management of low-level radioactive waste generated in the region." See Compact, Art. 1, 99 Stat. 1872 (Opp. App. 6a). Under the Compact, a pre-existing facility in Barnwell County, South Carolina, initially provided for the disposal of the region's low-level radioactive waste, but the Compact stated that "in no event shall this disposal facility serve as a regional facility beyond December 31, 1992." See Compact, Art. 2(10), 99 Stat. 1873 (Opp. App. 8a).

The Compact created the Commission to "develop and adopt * * * procedures and criteria for identifying a party state as a host state for a regional facility" and to choose a host State for that facility. Compact, Art. 4(E)(6), 99 Stat.

1875 (Opp. App. 12a-13a). The Commission consists of two representatives from each party State, each of whom is entitled to one vote. Compact, Art. 4(A) and (B), 99 Stat. 1874 (Opp. App. 11a). Upon becoming a party to the Compact, each State was required to pay $25,000 to the Commission for use in covering the Commission's costs. Compact, Art. 4(H)(1), 99 Stat 1876 (Opp. App. 15a). In addition, the Compact requires each State hosting a regional waste disposal facility to levy "special fees or surcharges on all users of such facility" to be paid to the Commission, to the extent required to cover its annual budget. Compact, Art. 4(H)(2), 99 Stat. 1876 (Opp. App. 15a-16a).

The Compact confers on the Commission various duties and powers. Compact, Art. 4(E), 99 Stat. 1874-1875 (Opp. App. 11a-14a). Among other things, the Commission, upon a majority vote of its members, is authorized:

> To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes.

Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a). The Compact makes clear, however, that the Commission "is a legal entity separate and distinct from the party states capable of acting in its own behalf and is liable for its actions." Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a). Accordingly, "[l]iabilities of the Commission shall not be deemed liabilities of the party states." *Ibid.*

The Compact also provides that "[a]ny party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission,

including suspension of its rights under this compact and revocation of its status as a party state." Compact, Art. 7(F), 99 Stat. 1879 (Opp. App. 23a). Sanctions may be imposed "only upon the affirmative vote of at least two-thirds of the Commission members." *Ibid.*

2. The present controversy arises from the Commission's decision to sanction the State of North Carolina. In 1986, the Commission chose North Carolina as the host State for a regional waste disposal facility. See Mot. for Leave to File Bill of Complaint (Mot.) 7. To assist in developing the facility, the Commission appropriated money from its annual budget for a trust fund for North Carolina's use in creating the facility. Mot. 9; Opp. 4-5. The Commission also adopted a Capacity Assurance Charge on waste sent to the Barnwell County, South Carolina facility "[t]o assure the timely development of the second regional disposal facility in North Carolina." Mot. 9; Opp. 5. In 1990, however, North Carolina notified the Commission that it could not meet the January 1, 1993 target date for completion of the facility. See Mot. 9. The Commission nonetheless continued to help fund the development of the facility through the assessment of additional fees on waste sent to the Barnwell County facility. See Mot. 9-10.

In December 1994, North Carolina informed the Commission that the opening of the new facility would be postponed until 1998. Mot. 11. In 1995, South Carolina withdrew from the Compact after the Commission rejected that State's proposal to extend the operation of the Barnwell County facility for all of the party States except North Carolina. *Ibid.* After South Carolina's withdrawal, the Commission informed North Carolina that additional Commission funding would be unavailable, because the Commission could no longer obtain fees from the Barnwell County site. See Mot. 11-12. In June 1996, North Carolina notified the Commission that it could not continue developing the second facility without further

funding from the Commission. Mot. 12-13. The Commission and North Carolina engaged in further discussions regarding the funding issue, but were unable to resolve their differences. See Mot. 13-16.

On June 21, 1999, the Florida and Tennessee Commission representatives filed with the Commission a sanctions complaint against North Carolina. Mot. 17. The complaint alleged that, by failing to provide the second disposal facility for the region, North Carolina had violated the Compact. *Ibid.* The complaint sought, *inter alia*, the return of nearly $80 million in funding that the Commission had provided to North Carolina to assist in developing the facility. *Ibid.* On July 26, 1999, North Carolina withdrew from the Compact, taking the position that the Commission had violated the Compact by cutting off supplemental funding of the facility and stating that it "had no option but to" withdraw. See Mot. 18. In November 1999, the Commission sent North Carolina notice of a hearing on the sanctions complaint. *Ibid.* The hearing was held in December 1999, but North Carolina did not participate. Mot. 18-19. North Carolina asserted that the Commission lacked jurisdiction to hold the sanctions hearing because North Carolina had voluntarily withdrawn from the Compact.

After the hearing, the Commission unanimously found that North Carolina had violated the Compact. Mot. 19. It ordered North Carolina to repay $79,930,337 to the Commission, plus interest accruing from January 1, 1998, the date when North Carolina stopped its work on the second facility. *Ibid.* The Commission also ordered North Carolina to pay the Commission's attorney's fees and $10 million for the loss of revenue that the Commission would have received from the facility in North Carolina. *Ibid.* The Commission directed North Carolina to comply with the sanctions order by July 10, 2000. *Ibid.* North Carolina has not complied with the order. See *ibid.*

In its Motion for Leave to File a Bill of Complaint, the Commission asks this Court to determine (1) whether, under the Compact, the Commission had authority to issue the sanctions order against North Carolina, and (2) whether North Carolina is obligated to comply with the sanctions order. Mot. 20. The Commission contends that this Court has exclusive original jurisdiction over the case under Article III, Section 2 of the Constitution and 28 U.S.C. 1251(a) because it involves a dispute between "two or more States." See Mot. 24; Bill of Complaint (Complaint) 1-2. The Commission asserts that it may invoke this Court's exclusive original jurisdiction because it "stands in the shoes of the member States in this action" by virtue of the Compact authorization for the Commission "'[t]o act or appear on behalf of any party state or states' before any court of law." Mot. 24 n.5 (quoting Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a)).

North Carolina argues that the Commission is not a State and thus cannot invoke this Court's original jurisdiction. Opp 11-12. North Carolina contends that the Commission instead is "a legal entity separate and distinct from the party states," which is "capable of acting on its own behalf, liable for its own actions, and vested with specific statutory rights and obligations." *Id.* at 12 (citing Compact, Art. 4, 99 Stat. 1874-1877 (Opp. App. 11a-18a)).

The parties thus disagree about (1) whether this Court has exclusive original jurisdiction over the Bill of Complaint, and (2) whether, if so, the present case warrants the Court's exercise of its jurisdiction. See Mot. 24-29; Opp. 11-25.

DISCUSSION

THIS COURT SHOULD NOT EXERCISE JURISDICTION OVER THIS SUIT

The Court should deny the Commission's Motion for Leave to File a Bill of Complaint. This Court would have

exclusive original jurisdiction over a suit brought by one or more of the States that are parties to the Southeast Interstate Low-Level Radioactive Waste Interstate Compact against North Carolina based on that State's alleged violations of the Compact. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673 (1995) (suit by Kansas against Colorado for enforcement of interstate compact). The same cannot be said, however, of a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission against North Carolina. The Commission, which was created by the Compact, is not itself a State under our constitutional structure. There is, moreover, no reason to believe that, when Congress approved the Compact, it intended to authorize the Commission either to act as a "State" for purposes of invoking this Court's original jurisdiction or to invoke this Court's original jurisdiction on behalf of the States that are parties to the Compact. The present case accordingly does not fall within the Court's exclusive original jurisdiction over "all controversies between two or more States." 28 U.S.C. 1251(a). The Court therefore should deny the Commission's motion for leave to file a bill of complaint, and the dispute should be resolved in another forum or through other means.[1]

A. The Commission Is Not A State

The Constitution grants this Court original jurisdiction over suits "in which a State shall be Party," U.S. Const. Art. III, § 2, but Congress has limited the Court's exclusive original jurisdiction to "controversies between two or more States,"

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[1] Because this case does not fall within the Court's exclusive original jurisdiction, we do not address whether the circumstances of the case present a sufficiently serious matter, and are otherwise appropriate, to warrant this Court's exercise of that jurisdiction. See *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (the Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court") (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

28 U.S.C. 1251(a). The Commission itself is plainly not a State, and it should not be treated as one for present purposes. The Commission therefore cannot satisfy the fundamental prerequisite for invoking this Court's exclusive original jurisdiction.

1. "The States, as separate sovereigns, are the constituent elements of the Union." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994). The Commission, by contrast, is an interstate body created by the Compact. The Commission exists solely for purposes of administering the Compact. The party States entered into the Compact by enacting enabling legislation, and Congress consented to the Compact in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859. The Commission is a Compact Clause entity that "owe[s] [its] existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States.'" *Hess*, 513 U.S. at 42.

This Court's decisions in *Hess* and *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), are instructive. In each of those cases, a Compact Clause entity sought to invoke the party States' Eleventh Amendment immunity from suit by private individuals, and in each instance the Court rejected that invocation. See *Hess*, 513 U.S. at 40-52; *Lake Country Estates*, 440 U.S. at 401-402. The Court noted that "there is good reason not to amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes." *Hess*, 513 U.S. at 42. There is similarly good reason not to treat a Compact Clause entity as a State for purposes of invoking this Court's original jurisdiction.

The Commission contends that *Hess* and *Lake Country Estates* are inapposite because "[o]riginal jurisdiction, unlike sovereign immunity, spares states not from the indignity of being brought into *federal* court, but rather from the dangers

inherent in entering the court of another state for relief." Reply Br. 2. But that observation, even if true, misses the point. The Commission is not a State, and it therefore does not face any "dangers inherent in entering the court of *another* state." *Ibid.* (emphasis added). The Commission, by the terms of the Compact, is a separate entity. See Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a) (the Commission is "a legal entity *separate and distinct* from the party states capable of acting in its own behalf and is liable for its actions") (emphasis added); see also *ibid* (the Commission's liabilities "shall not be deemed liabilities of the party states").[2]

2. The Constitution grants the States access to this Court's original jurisdiction precisely because they are "the constituent elements of the Union." *Hess*, 513 U.S. at 40. The States entered the Union on the understanding that they were separate sovereigns and were surrendering only a portion of their sovereign powers. They retained, through the Compact Clause, a portion of their formerly unfettered authority to resolve interstate disputes through agreement. And they have, through the Eleventh Amendment, a portion of their sovereign immunity from suit. But they agreed to confer on this Court, through Article III's grant of original jurisdiction, judicial power to resolve interstate disputes "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." See *North Dakota* v. *Minnesota*, 263 U.S. 365, 372-373 (1923). See, *e.g.*, *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) ("The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would

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[2] The Commission's inability to invoke the Court's original jurisdiction in its own right as a State in no way suggests that the States that are parties to the Compact may not invoke that jurisdiction on the basis of a proper cause of action.

amount to *casus belli* if the States were fully sovereign.") (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983)).

The States may, with Congress's consent, create Compact Clause entities. But those entities "occupy a significantly different position in our federal system than do the States themselves." *Hess*, 513 U.S. at 40. Compact Clause entities lack the normal sovereign attributes of States, such as the power to enact general legislation, exercise police powers within defined borders, or organize courts of general jurisdiction. Because Compact Clause entities have no separate sovereign identity, they have no inherent claim to sovereign immunity. *Id.* at 39-40. They similarly have no inherent right to invoke this Court's original jurisdiction in the way one of the States might do.[3]

Unlike the States, Compact Clause entities are "creations of * * * discrete sovereigns" that "address 'interests and problems that do not coincide nicely either with the national boundaries or with State lines.'" *Hess*, 513 U.S. at 40 (citation omitted). The States (and sometimes the federal government) exercise cooperative power over the Compact Clause entity's actions for narrowly defined purposes. As a result, the Compact Clause entity's "political accountability is diffuse," and it lacks close ties to an identifiable body of citizens. *Id.* at 42. Furthermore, a Compact Clause entity can be disbanded once it has served its purpose. It therefore has none of the historical, legal, or functional *sovereign* attributes of a State.

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[3] The Court's decisions make clear that the States are entitled to invoke this Court's original jurisdiction based on their identity as sovereign States, and not on the basis of particular powers that they may exercise. For example, the Court has made clear that even entities that "exercise a slice of state power" (*Lake Country Estates*, 440 U.S. at 401 (internal quotation marks omitted)), such as political subdivisions of a State, are not "States" within the meaning of 28 U.S.C. 1251(a). *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98 (1972).

Just as this Court has recognized that compact commissions are not entitled to Eleventh Amendment immunity, lower courts have declined to treat compact commissions as States for other judicial purposes. For example, in *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 974 F. Supp. 762 (D. Neb. 1997), a district court rejected a compact commission's claim that it should be treated like a State for Seventh Amendment purposes. The court concluded that "[a]n examination of the history, purpose, and nature of interstate compacts reveals that the Commission is not a 'quasi-sovereign' as it claims." *Id.* at 764. An interstate compact "does not create a separate sovereign state, and its powers are in no way equivalent to that of an independent sovereign." *Id.* at 765. The compact commission in that case, like its counterpart in the present case, "simply administers a regional waste compact—it exercises authority only in a very narrow sphere and only as an amalgamation of the interests of its member states." *Ibid.*[4] That reasoning applies with equal force here. The Commission is not a State and should not be considered the equivalent of a State for purposes of invoking this Court's original jurisdiction.

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[4] The State of Nebraska sued the Central Interstate Commission in federal district court on at least two previous occasions as well *Nebraska ex rel Nelson v Central Interstate Low-Level Radioactive Waste Comm'n*, 902 F Supp 1046 (D Neb 1995), *Nebraska ex rel Nelson v Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F Supp 1205 (D Neb. 1993), aff'd, 26 F 3d 77 (8th Cir.), cert denied, 513 U S 987 (1994). Most recently, the Eighth Circuit affirmed the district court's rejection of Nebraska's challenge to the Central Interstate Commission's authority to establish deadlines for the State to process a waste disposal facility license application See *Nebraska v Central Interstate Low-Level Radioactive Waste Comm'n*, 187 F 3d 982 (1999) Under the Commission's argument in the present case, none of these cases could have proceeded in federal district court because this Court would have had *exclusive* original jurisdiction over Nebraska's claims

B. The Commission Cannot Invoke This Court's Exclusive Original Jurisdiction As The Representative Of States That Are Parties To The Compact

The Commission also contends that it "stands in the shoes" of the States that are parties to the Compact and is entitled to invoke this Court's original jurisdiction as a representative of those States for purposes of this action. Mot. 24 & n.5; Reply Br. 2-3. That contention is unsound.

1. The Commission asserts that Congress may authorize an entity created by interstate compact to invoke this Court's original jurisdiction on behalf of the States that are parties to the compact. Reply Br. 2-3. It is not clear, however, that Congress may do so. A Compact Clause entity is not a "State" within the meaning of the Constitution, and the Commission has pointed to no source of authority for Congress to provide that a Compact Clause entity shall have (or be entitled to assert) the constitutional entitlements of a State in an Article III court as against a defendant that *is* one of the States of the Union. In addition, a suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment. See U.S. Const. Amend. XI.[5]

There is no need to reach those constitutional issues here, however, because there is no sound reason to conclude that, when Congress approved the Compact, it intended to allow the Commission to invoke this Court's original jurisdiction as

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[5] This Court's decisions holding that "nonconsenting States are immune from suits brought by federal corporations, foreign nations, or Indian tribes" demonstrate that a State's sovereign immunity in federal court is not limited to "the strict language of the Eleventh Amendment." *Alden* v. *Maine*, 527 U.S. 706, 728 (1999) (citations omitted). Accordingly, although Congress has provided that this Court has original (but not exclusive) jurisdiction over "[a]ll actions or proceedings *by* a State against the citizens of another State" (28 U.S.C. 1251(b)(3) (emphasis added)), it has not provided for original jurisdiction over a suit brought *against* a State.

a representative of the States that are parties to the Compact. The Compact allows the Commission to act in a representational capacity for certain purposes, but the Compact does not expressly grant the Commission power to invoke this Court's original jurisdiction or to sue a State.

The Compact provides that the Commission may:

> act or appear on behalf of any party state or states * * * as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes.

Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a). The Compact's mere mention that the Commission may appear in various tribunals, including "any court of law," falls far short of providing the Commission authorization to invoke this Court's original jurisdiction to sue a member State and to precipitate the constitutional questions that would arise from such a novel action. Compare *College Sav Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (citing *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 577-579 (1946)); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 75 (2000).

Congress has consistently confined this Court's original jurisdiction within a narrow compass. See 28 U.S.C. 1251. Furthermore, Congress is undoubtedly aware of what "has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.'" *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972). This Court should not lightly assume that Congress intended to enlarge the category of parties that may invoke this Court's exclusive original jurisdiction on the basis of the faint implication that the Commission seeks to draw from the Compact. Cf. *Mississippi* v. *Louisiana*, 506 U.S. at 76 (noting that the "delicate and grave" character of original jurisdiction renders it "obligatory only in appropriate cases" (citation omitted)).

2. The result is the same if the question of the Commission's authority to invoke this Court's exclusive original jurisdiction is viewed as one of standing. This Court has held that, in appropriate circumstances, an association or organization has standing to sue to redress injuries to its members. The Court has articulated a three-prong test for such "representational" standing, under which an association or comparable entity has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Food & Commercial Workers* v. *Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Applying the third prong of that test here, both the nature of the claim asserted (a claim by a number of States that another State has violated an interstate compact) and the relief requested (monetary and other relief against a sister State) ordinarily would require the participation of the party States themselves as plaintiffs in a suit within this Court's exclusive original jurisdiction.

This Court has ruled, in a case against a private defendant, that the third prong of this associational or representational standing test is prudential, not constitutionally required under Article III, and that it therefore may be displaced by an Act of Congress. See *Food & Commercial Workers*, 517 U.S. at 555-558. There is no need here to decide whether the third prong should likewise be regarded as merely prudential where the plaintiff is an organization created by an interstate compact among sovereign States and the defendant is a sister State. As we have noted, the general terms of the Compact at issue in this case are insufficient to constitute the requisite statutory authorization for the Commission to bring such a suit under this Court's exclusive original jurisdiction and thereby displace an otherwise applicable prudential rule.

3. Even if the foregoing obstacles to suit as a representative of States that are parties to the Compact could be overcome in another case, the Commission would be incorrect in characterizing its role in this case as one of "stand[ing] in the shoes" of the party States. Reply Br. 3. The Commission, in its capacity as the Compact Clause entity responsible for administering the Compact, imposed a sanction on one of the States that is a party to the Compact. The Commission's sanction requires North Carolina to return nearly $80 million (plus interest) to the Commission. The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the Commission—and not the States that are parties to the Compact—dispersed the funds to North Carolina in the first place. In accordance with the Compact, the Commission itself generated virtually all of those funds through the assessment of fees on users of the regional waste disposal facility. See Compact, Art. 4(H)(2), 99 Stat. 1876 (Opp. App. 15a). Hence, in seeking to enforce the sanction, the Commission is not acting in a representative capacity, but is instead acting in its own right, as "a legal entity separate and distinct from the party states." Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a).

C. The Commission Has An Alternative Forum For Pursuing Its Claim

The Commission contends that if this Court does not exercise its original jurisdiction, there is no alternative forum in which it can litigate its claims against North Carolina. See Mot. 27-29; Reply Br. 6-7. That argument is also unsound.

The Commission contends that the present case should not be heard in state court because "[i]t requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States," and "[a] State cannot be its own ultimate judge in a controversy with a sister State." Mot. 28 (quoting *West Va. ex*

rel. Dyer v. *Sims*, 341 U.S. 22, 28 (1951)); see Reply Br. 7. The Court's rejection of original jurisdiction over a suit by the Commission would not, however, preclude one or more States that are parties to the Compact from bringing an original action under 28 U.S.C. 1251(a) against another party State to enforce the Compact and seek an appropriate remedy. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987).

In any event, the Commission's reliance on *Sims* is misplaced even as to the Commission's own claims. The Court's decision in *Sims* arose from an interstate compact reflecting an agreement among eight States to curtail pollution discharges into the Ohio River. 341 U.S. at 24. A controversy arose because of "conflicting views between officials of West Virginia regarding the responsibility of West Virginia under the Compact." *Id.* at 25. The West Virginia Supreme Court resolved that intrastate dispute through a mandamus action, but this Court, on writ of certiorari, reversed that court's interpretation of the compact. *Id.* at 32.

This Court observed that "[a] State cannot be its own ultimate judge in a controversy with a sister State" in the context of this Court's *review* of the state court judgment on certiorari. See *Sims*, 341 U.S. at 28-29. The Court explained that, although the West Virginia Supreme Court of Appeals "is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution," this Court is "free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States." *Id.* at 28. The Court specifically observed that "the fact the compact questions reach us on a writ of certiorari rather than by way of an original action brought by a State does not affect the power of this Court." *Id.* at 30.

Contrary to the Commission's contention, *Sims* demonstrates that state courts *are* appropriate fora for resolving

interstate compact controversies that do not fall within this Court's exclusive original jurisdiction. This Court may review a state court's interpretation of a compact—which is a matter of federal law—through a writ of certiorari. The Eleventh Amendment would pose no bar to the Court's exercise of appellate jurisdiction in that context. See *McKesson Corp* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation*, 496 U.S. 18, 28 (1990). This Court can accordingly ensure that a state court's initial exercise of jurisdiction over a compact dispute involving a non-State party would not result in a single State being the "ultimate judge" of the federal issues raised in the bill of complaint. See *Sims*, 341 U.S. at 26-30.[6]

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[6] The Commission contends that North Carolina "does not even concede that a State's sovereign immunity would not preclude a resolution of this dispute in the North Carolina courts." Reply Br. 8 n.3 (citing *Alden* v. *Maine*, *supra*). North Carolina's brief in opposition indicates, however, that North Carolina courts would be an available and appropriate forum for resolving the dispute. See Opp. 25 ("there is no merit in Plaintiff's contention that a contract dispute between the Commission and North Carolina cannot be fully and fairly heard in North Carolina state courts"). Furthermore, if this suit is not barred by the Eleventh Amendment, as the Commission's filing of an action against North Carolina in this Court apparently assumes, the Eleventh Amendment likewise presumably would not bar a suit by the Commission against North Carolina in federal district court.

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

MARK B. STERN
MICHAEL S. RAAB
Attorneys

May 2001

APPENDIX B

SANCTIONS HEARING
SOUTHEAST COMPACT COMMISSION

Proceedings before Curtis Van Kann, Hearing Officer, reported by Michael R. Brentano, Certified Court Reporter and Notary Public, at Embassy Suites Hotel, 4700 Southport Road, College Park, Georgia, on the 8th day of December, 1999, commencing at the hour of 8:30 a.m.

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* * *

[page 13] The State of North Carolina has, by its actions, left the Compact with no recourse but to take sanctions against it to recover its funds. However, nothing can reclaim the time that has been lost. Once again, the Southeast Compact is faced with a prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive materials due to the lack of disposal facility.

And that's the end of my statement.

MR. VAN KANN: All right, thank you, Commissioner Mobley. It occurs to me that the statement that you have just made is probably part opening statement and part testimony because there were certain factual matters there. And I think in order to be in accord with the procedures adopted by the Commission, I'd like to give you a retroactive oath that the testimony that you have just given, to the extent it is testimony, is—can be under oath for purposes of any review.

Would you raise your right hand. Do you solemnly swear that the testimony you've just given is true and correct to the best of your knowledge and belief so help you God?

MR MOBLEY: Yes, sir.

* * *

[page 34] concerns over management and time frames of the project. We have worked with the Authority, regional generators, and others to develop a comprehensive plan to provide funding for a completion of the facility. And once again, because of funding issues and work issues on their part, that plan was never executed to its full extent

On December 19th, 1997, the Authority voted to shut down the project, pending receipt of instructions from the North Carolina General Assembly or additional funding from the Commission. And I believe one of those letters may already be in as an attachment. If I've duplicated some attachment there already, I apologize. But that letter is December 19th, 1997.

And finally, I would like to acknowledge Exhibit 3, which is the letter previously mentioned in which North Carolina has stated that they have withdrawn from the Compact and will not be participating in any further actions. My point is that despite having no mandate to fund the project, this commission has done that to over $79 million, that North Carolina enjoyed substantial benefits in protecting its public health as a member of this Compact through the years, and that when it came time [page 35] for them to do their part, as was voted in accordance with the Compact and to be the next host state, they were unable to meet those obligations in a timely manner and ultimately decided that they would not play.

And that's the end of my testimony.

MR. VAN KANN: All right. Thank you, Mr. Hunter. Let me ask if members of the Commission, commissioners, have any question for this witness. Again, we will start on the left and maybe just go right down the line starting with Commissioner Burks [sic] any questions?

Mr. Setser, any questions?

MR. SETSER: Yes, just briefly.

EXAMINATION

BY MR. SETSER:

Q. Coming from the perspective of various commission meetings that have been held an [sic] presentations and instructions we received from the executive director of the North Carolina Low Level Waste Management Authority, and at times from the Division of Radiation Protection in the State of North Carolina, have you—can you recall any specific instructions or guidance that had been given by either the general assembly or the governor to expedite of [sic] facilitate the development of a site?

* * *

[page 40] to demonstrate that the governor very clearly was apprised and knew what was required of the State.

Q. The Authority law speaks to the issue of paying back the expenses for siting the disposal site. What does the law say about that?

A. You'd have to refresh my memory. I believe after operation, they can collect those.

Q. And do you know how those funds were generated?

A. How they would be generated? By fees of people disposing of waste.

Q. The generators?

A. Right.

Q. That would be after —

A. You'd obviously have to have a site to do that.

Q. Correct. And those fees would go back to the host state, correct?

A. That's correct.

MR. JONES: No more questions.

MR. VAN KANN: Mr. Buckner, any questions?

MR. BUCKNER: I have none.

MR. VAN KANN: Miss Walters, any questions?

MS. WALTERS: No.

MR. VAN KANN: Any other members of the

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[page 54] MR. MOBLEY: Not specifically. It just—it was within a very short time frame, but I don't remember.

Q. (By Mr. Jones) At the time you had filed the complaint, how far had North Carolina progressed at that site?

A. They had shut down work by that time. And their work had gotten to a point where they felt like if they had all the remaining money that the Compact had given to them plus some additional funding, that they might be able to come to a decision on whether the site was capable of being licensed.

Q. When Barnwell closed—you've cited in your complaint that in 1995, South Carolina withdrew from the compact. When a source of funding from Barnwell was cut off to the Commission, was there any other major source of funding to the Commission from which funds could be given to the State of North Carolina?

A. No. We had no other funding other than some interest on our accrued funds.

Q. You spoke at the beginning of your testimony about the trade-off and benefits to a state being a member of the compact. In terms of North Carolina, could you elaborate on that? Would that mean they had access to Barnwell?

* * *

[page 62] processed and disposed of.

Q. I think there was a question earlier about—go ahead.

MR. HAWKINS: Please finish, I'm sorry.

MS. SHULTS: Go ahead.

MR. HAWKINS: Judge, may I? Dealing with—

MR. VAN KANN: Just again—

MR. HAWKINS: Charles Hawkins, commissioner from Virginia.

RE-EXAMINATION

BY MR. HAWKINS:

Q. Dealing with the financial aspects of the process. I was not a member of the Commission when the original compact law was passed. But there was some reference made in some of the correspondence I believe I read from the State of North Carolina about they refused to accept the entire burden of financial responsibility of building the site. In the original compact law itself, was it not a fact that the host state had the total responsibility of building the site and was not the Commission prohibited from investing money into the development of that site? Was that a fact?

A. I think that it's certainly true that the intent was that the host state would develop— would [page 63] expend the funds to develop the site and the concept was that they then would be able to recoup those costs by charging appropriate fees for the disposal of the waste. And it's clear that the compact legislation indicates that the compact does not have to pay for the disposal—development of the disposal site. I don't think it prohibits the Commission or the Compact Commission from assisting the state, but it does indicate that there is no requirement that we assist the state.

Q. Follow-up question, please, sir. But weren't—in fact, didn't we change the state compact laws to allow us to put moneys into the State of North Carolina and development of the site and the original compact law that was passed by the legislatures of participating states clearly stated that the

responsibility was of the host state and that the general assembly of North Carolina passed that in full understanding of their financial responsibility?

A. It's certainly true in the original compact legislation that they passed it that way. The amended—the amended or —or activities to amend the compact, I think, only addressed the question of whether a state could withdraw from the compact. This was after the designation of North Carolina.

* * *

[page 82] through that represented the State of North Carolina and not either the Authority or an individual agency. And we were told that his existing commissioners were people to represent the State of North Carolina.

Q. And then right about the same time, in June, which was just before that, in this letter says, Commission believing it was not prudent to spend commission funds expressed strong doubt that the project would ever be completed. I was looking for evidence of this doubt because the only thing I can determine was that Hunt had said—Governor Hunt had replied in correspondence that he supported the project but he needed money to carry it forward. And I was curious about if there were other statements that were not in the record by the governor or other elected officials that would indicate this—the genesis for the strong doubt.

A. Well, there are two issues. Let me first comment on the latter one, the money. There has never been an indication where the Compact Commission has indicated its unwillingness to continue to use the funds it had at its disposal to fund the State of North Carolina as it went forward to develop the site. It was only when we got to the point where we—the projections for licensure of the site, both time and [page 83] cost, became more than the money that we had in the bank to cover, thus creating a potential shortfall of several million dollars, and I don't remember the exact number at this point in time.

And it was then that we created a task force which Commissioner Mobley chaired with a number of stakeholders to try to develop a funding mechanism to cover that shortfall. And one was developed and, of course, as we remember serving on it, the State of North Carolina did not accept that funding proposal, nor did they come back with one of their own that was an alternate or better or different from that that would allow the shortfall to be met so that it could go forward. It was only after that time when there was no hope of having moneys to reach the target date that the Commission decided it was not prudent to expend what reserve funds it did have in the bank to continue the process.

So from a funding standpoint, we've always been on record as indicating we were willing to fund with what moneys we had. But remember that when the State of South Carolina withdrew from the compact as a party state, it was, in effect, prior to that time the enabling mechanism for the collection of fees since they had control of the fees that the generators paid [page 84] in order to dispose of waste at the site. So that was the mechanism. So whenever they withdrew as a party state, that mechanism went away and, therefore, the only income and the only moneys that the Compact Commission had available to it was the interest earned on the existing principal that it already had in the bank and there was not going to be a continuing source of funds to either provide North Carolina or to even support the budget of the Compact Commission. So that's the discussion of funding as I recall it.

And refresh my memory on the other issue.

Q The strong doubts, where—

A. The doubts arose out of the continued moving target as far as completion of tasks and timetables moving toward an overall goal of satisfying the licensing agency. It was definitely a moving target that didn't stay in one place. And this caused considerable doubt. And as a result, we expressed this strong reservation to North Carolina.

In fact, we enacted a resolution requiring them to develop a coordinated work plan that was agreed to by both the Authority and the licensing agency with milestones and projections of cost in order to allow this to go forward. At which time the State of North Carolina hired another contractor, Harding Lawson

* * *

[page 91] for environmental reasons, or for just the ability to do it in just a much easier manner, there has to be some understanding that commitments are made.

The process that I understand was one that went through a designation of points for the states and everyone agreed that that would be the end result of the host state first time around. And North Carolina had the points, it's my understanding, I was not here at the time. The legislation that went through the bodies of the general assemblies of all the states said, in fact, we were going to work together for the mutual benefit of all the people in our area.

If compacts have no more validity than this one does, and being able to withdraw at a time that you feel is to your convenience, the whole concept falls apart. And we all lose from that. This goes beyond this compact, this goes beyond this group of states, this goes into the arena of what we can depend on as we enter into agreements among consenting states for the betterment of our citizens. And if, in fact, compacts cannot stand the test of troubled waters, the validity of those compacts are not going to last.

And I would think, too, Judge, at this juncture if, in fact, this does take the course that it seems to be taking, and if something is not in place to [page 92] bring some sort of stability to the commitments made, no state, no general assembly will be willing to go on record to support any other compact with their moneys or their time or their efforts,

knowing full well that at any point during the process, a state can withdraw based on the whim of that particular legislative body. And that's no way to build agreements, sir. Thank you.

MR. VAN KANN. Any questions for Commissioner Hawkins? Yes, sir, Commission [sic] McNeer.

MR. McNEER: A.C. McNeer. I have no question, I just want to confirm my opinion one hundred percent of what he's just said. I think he's absolutely correct that if we don't resolve this issue here, it has national implications and, for the future of the compact system itself, I think we have to resolve it in a responsible way or we're inviting trouble.

And I commend you for your comments as always. Thank you.

MR. VAN KANN: Any other commissioners have any statements or questions with respect to Commissioner Hawkins? Any member of staff or counsel? Thank you, Commissioner.

Any other commissioners from Alabama, Georgia, Mississippi, or Virginia wish to offer [page 93] anything at this time? Okay. Seeing none, I'll assume that we can move on.

I did note earlier that the Commission received a letter from the Attorney General of North Carolina dated December 1, 1999. A copy of it is in the back of the room and I certainly won't undertake to read it in its entirety. It has been made an exhibit to this record, Exhibit 3. And among other things, the letter says that after careful consideration by all concerned, it has been decided that North Carolina will not participate in the sanctions proceeding.

And I'm advised that the Commission has not received any subsequent communication from North Carolina changing that position. Nevertheless, if there is anyone in the room representing the State of North Carolina who wishes at this

point to be heard by way of evidence or documentary submissions, he or she is certainly welcome to come forth and be heard.

Well, seeing no one rushing to the front, I think we can move on to the next phase of the proceeding. And that is for closing statements of the complainant parties, Florida and Tennessee. Any of the representatives of those states would like at this point to offer a closing statement, they may certainly do that. And after that, we will move to the stage of

* * *

APPENDIX C

RESOLUTION

Whereas, the Southeast Compact Commission (the "Commission") is charged by Article 4(E)6 of the Southeast Interstate Low-level Radioactive Waste Management Compact (the "Compact") with the duty of identifying a host state for the development of a second regional disposal facility and seeking to ensure that "such facility is licensed and ready to operate as soon as required but in no event later than 1991"; and

Whereas, the Commission is charged by Article 4(E)4 of the Compact with the duty of developing procedures for determining, "consistent with consideration for public health and safety, the type and number of regional facilities which are presently necessary to manage waste generated within the region", and

Whereas, the Commission, although not obligated to do so under the Compact provisions, deems it appropriate and necessary to provide financial assistance to any state duly designated as the next host state for the initial planning and administrative costs and other pre-operational costs associated with that state's obligation to create and operate a regional facility in accordance with Article 3 of the Compact; and

Whereas, the Commission has appropriated, in its annual budget for the fiscal year July 1, 1986-June 30, 1987 the sum of $200,000, designated as a "State Assistance Trust Fund," to be used for the aforesaid purposes, and

Whereas, the Commission intends to appropriate the same or similar amounts in future annual budgets for the same aforesaid purposes. * * *

* * *

* * * an independent certified public accountant, whose report shall be made available to the Finance Committee and to the Commission.

7. After approval by the Finance Committee, the Executive Director is authorized to make payments and disbursements from the Fund only for the purposes set forth in Paragraph 1 of this Resolution and in accordance with the By Laws of the Southeast Compact Commission Payments and disbursements shall be made only on application by the duly designated agency of the next host state.

8. Each application by the duly designated agency of the next host state shall be on a form approved by the Executive Director. The application shall state in full the reasons and the need for the requested payment and the precise purposes for which the requested payments will be used.

9. No application will be received from, and no payments from the Fund will be made to, any private individual, organization or corporation.

10. In the event that the Finance Committee decides not to authorize payments as requested by the duly authorized agency of the next host state, that agency may request the full Commission to review and reconsider the decision. The Commission's decision shall be final.

Adopted February 9, 1988
Biloxi, Mississippi

APPENDIX D

MINUTES
SOUTHEAST COMPACT COMMISSION
October 24, 1989
Page Five

Report from Host State Identification Committee

Ms. Barbara Wrenn, Chairman, reported that the Host State Identification Committee last met on September 26, 1989 in Nashville, Tennessee, to become more acquainted with the generator survey report of the Technical Advisory Committee. She stated that Commissioner Mobley made a report indicating that waste reduction continues. The Host State Identification Committee continues to look at the criteria for selecting the next host state. The distinction between volume and curies may become more important in the next selection because while the volumes are reducing drastically, curies are not. This may be something to be weighed differently in the next selection process.

In the southeast region, it is not anticipated that the generators will have 32 million within the next 20 years. The threshold for closure for the North Carolina facility is either 20 years of operation or 32 million feet, whichever comes first. It [sic] not anticipated that we will need a third regional disposal facility in operation before the two decade period. The committee will continue to study the criteria within the parameters expected by the state of North Carolina

Commissioner Godwin questioned whether the decrease in volume would affect the financing of future facilities. Ms. Wrenn indicated that this was a finding of the committee since the financing heretofore was based on volume. It may be necessary in the future to alter the financing of the facility.

Report of the Public Participation Committee

Commissioner Ben Smith reported that the Committee recommends having an annual event for legislators to inform them of the work of the Compact. He presented a proposed budget and agenda for the event. Upon a motion by Mr. Smith, the Commission voted unanimously to proceed with the conference plans and to expand the Commission budget to include $55,000 for the annual conference, targeting the summer of 1990 for the first conference.

Commissioner Bailey questioned whether more than two legislators could attend. Mr. Smith said it would certainly be welcome if paid for by that state.

It was suggested that, in addition to the planned conference for southeast legislators, the Southern Legislators' Conference would be a good avenue for exposure, such as a booth, exhibit or reception.

Report from the Finance Committee

Capt. Briner presented the following recommendation to the Commission in the form of a motion.

> The Finance Committee recommends that the Commission approve the development of a site development charge for the purpose of repayment of a Capacity Assurance Charge and direct the Finance Committee to proceed with the development of a methodology for its implementation.

[Page Six]

Mr. Smith discussed repayment of the charge in reference to generators who [sic] will not be operating in the future and the volumes for those currently disposing of waste will vary. He suggested that there be a payback of the Capacity Assurance Fee and to provide some incentives so that there will not be stockpiling of waste and excessive storage.

There was discussion from several Commissioners in reference to the Capacity Assurance charge and potential payback.

By unanimous vote, the motion was approved.

A proposal to implement a Capacity Assurance Charge was then presented by Captain Briner (see "Summary Description of Capacity Assurance Charge"). The meeting was briefly recessed so that everyone could look over the proposal before voting.

When the meeting was reconvened, a roll call vote was taken, and the proposal was adopted with no opposition.

Report from Commissioner Shealy

Commissioner Shealy reported on the judgment of compliance with the milestones in the Low-Level Waste Policy Amendments Act. In reference to the July 1, 1988 milestone where a host state had to be identified and siting plans submitted, Puerto Rico and three states were not in compliance. Rapidly approaching is the January 1, 1990 milestone which requires that a complete license application be submitted to the Nuclear Regulatory Commission or an agreement state, whichever applies. Mr. Shealy further discussed the option of Governor certification. Mr. Shealy submitted a Guidance Document for determining compliance with the third milestone, to be entered into the minutes of the meeting. This document contains four key elements that the three host states (Nevada, Washington, and South Carolina) feel should be in the governors' certifications. Currently only one draft Governor's certification has been received (from the Midwest Compact). He also pointed out that the Governor's certification is to be submitted to the U.S. Regulatory Commission.

Dr. Howell questioned whether the South Carolina site would definitely be closed, internally and externally. John McMillan answered that the site would be closed on the regional facility, but South Carolina has the option to use it for their own waste.

Commissioner Cynthia Bailey made the following motion, which was unanimously approved.

> That the Commission defer to South Carolina's judgement on the enforcement of other milestones as regards access to the regional facility but reserving any independent authority the Commission might have for the future accessment.

SUMMARY DESCRIPTION OF CAPACITY ASSURANCE CHARGE

Adopted October 24, 1989

1- Name

This special fee on all current southeastern users of the Barnwell, S.C. disposal facility shall be denominated as a "Capacity Assurance Charge".

2- Purpose

To assure the timely development of the second regional disposal facility in North Carolina by furnishing additional funds to the Southeast Compact Commission ("Compact") for utilization by the NC Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of North Carolina's site development. In this phase a site will be selected and a license to build and operate the facility will be obtained This will assure the availability of a site for all southeast generators and thus this fee is a future disposal capacity assurance charge.

3- Who Pays the Charge

All southeast low-level radioactive waste generators using the Barnwell, South Carolina disposal facility.

4- Basis for Calculating the Charge

A cubic foot charge for volumes disposed at the Barnwell, S.C. disposal facility.

5- Duration

Beginning January 1, 1990 and continuing for so long as necessary to accumulate a total of $21.4 million, which funds shall be utilized to partially defray the cost of site selection and licensing of a new regional disposal facility in North Carolina, or a license is granted, whichever first occurs. In no event will the charge be collected later than December 31, 1992, due to the closure of the regional facility in Barnwell, South Carolina.

Projected charges would yield $9 million per year based upon 450,000 cubic feet at $20/cubic foot.

6- Exemptions

None

7- Specific Power of the Compact to Allocate Funds to NC

It is the duty of the Commission to "provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities." [Article 4(E)5.]

The Compact Commission shall seek to ensure that [the new regional facility in NC] is licensed and ready to operate as soon as required . . . [Article 4(E)6.]

"It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing . . . sufficient facilities for the proper management of low-level radioactive waste generated in

the region; . . . [and to] distribute the costs, benefits, and obligations of successful low-level radioactive waste management equitably among the party states . . ." [Article 1]

8- Specific Power of the Compact to Accept Funds from the State of South Carolina

"The Commission may accept for any of its purposes and functions any and all donations, grants of money . . . from any state . . . or from any institution, person, firm, or corporation, and may receive, utilize, and dispose of the same." [Article 4J.]

9- Specific Power of the SC Budget and Control Board to Impose, Collect, and Disburse Proceeds from Charges

"Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which: a. must be sufficient to cover the annual budget of the Commission ." [Article 4H.2.]

Sec. 13-7-30 of the SC Code specifically empowers Budget and Control Board to impose, collect and disburse special fees or surcharges.

10- Specific Power of the Authority to Accept Funds From the Compact

NCGS 104G-6a(13) expressly authorizes the Authority to apply for, accept and expend grants of money from a compact commission for any purpose authorized by the enabling statute creating the Authority.

11- Purposes for Which the Authority May Expend the Proceeds from these Charges

The Authority is granted broad powers to do anything necessary and proper to site, design, construct, and

operate a disposal facility either itself or through a private operator. [NCGS 104G-6 and 104G-10].

12- How Will the Charges Be Determined

The Authority shall submit to the Compact an annual budget projecting costs associated with paying the operating and maintenance expenses of the Authority, the costs of paying the Authority's contractors or consultants, and the costs of reimbursing NC agencies for their expenses incurred on behalf of or in support of the Authority.

The Compact shall transmit its own budget to the SC Budget and Control Board and shall include the amount requested by the Authority.

The SC Budget and Control Board shall determine the volume charge annually based upon estimated totals from southeastern generators.

13- Adjustments in annual volume charge

The charge shall be reviewed by the Southeast Compact Commission at least on an annual basis and may be adjusted due to changes in volumes.

14- How will charge be collected

The Barnwell site operator will collect the charge from all southeastern generators based upon disposed volumes.

The site operator will transmit the proceeds to the South Carolina State Treasurer who shall then transmit the funds to the Compact. For further detail, see "Attachment A: Procedure For Collection of Proposed Capacity Assurance Charge"

15- How will the funds be disbursed

The Authority will periodically submit an invoice to the Compact for payment from the accumulated funds derived from these charges. See "Attachment B:

Procedure For Expenditure of the Proposed Capacity Assurance Charge Funds"

16- What controls will be placed on the use of these funds by the Authority

No payments shall be made by the Authority absent express or implied statutory authority in its enabling legislation for the specified purpose.

Payments to Chem-Nuclear Systems, Inc. will be subject to the exact terms and condition contained in their written contract with the Authority.

Chem-Nuclear shall submit a work plan based upon milestones and schedules approved by the Authority. Invoices submitted by Chem-Nuclear shall be consistent with the approved work plan.

The Authority will implement a comprehensive monitoring and quality assurance program to support management and oversight of its contracts with Chem-Nuclear and others.

The Authority shall approve all service agreements and other obligations incurred on its behalf or in support of the Authority by other state agencies and contractors.

17- What mechanisms are available to the Compact to enforce compliance

The same generic sanctions to assure good faith compliance shall also be available to enforce these guidelines and policies.

Misuse, misapplication or misappropriation of funds provided by the Compact to the Authority shall also be subject to all the same legal remedies ordinarily available to parties.

18- Who will audit the receipt and expenditure of these funds

The Authority's books and records shall be subject to an annual audit by the North Carolina State Auditor in addition to those administrative policies and controls

imposed by its parent department, the North Carolina Department of Administration.

The results and written reports of audits for these governmental entities are public information and subject to inspection.

19- What priority will be used for applying the proceeds from these charges relative to state fund appropriations granted the Authority

As proceeds from these charges are collected from the Compact and deposited with the North Carolina State Treasurer, they will first be utilized to pay current or past obligations of the Authority. To the extent these charges are insufficient to pay the Authority's obligations, appropriated State funds shall be used. At the end of the licensing phase, any unexpended operating funds appropriated by the North Carolina General Assembly to the Authority shall revert to the State's General Fund.

Based upon current projections, available funds derived from the capacity assurance charges and state appropriations are expected to be adequate to pay all licensing expenses associated with the project.

Any and all costs that are not otherwise paid by the generators from these charges shall ultimately be repaid to the State of North Carolina with interest once the facility becomes operational. To maintain an accurate account of the total cost of developing and establishing the regional disposal facility, the Authority shall maintain a ledger showing the total amount of funds expended from the NC General Fund that are not otherwise recovered from these generator charges.

20- Documentation of Cost Projections

Attachment C indicates expenditure projections for the licensing phase from November 1, 1987 through

December 31, 1991 of $13,732,702 for the Authority and the State agencies associated with the regulatory and licensing aspects of the project. In addition, the Authority's prime developer/operator contractor, Chem-Nuclear Systems, Inc., began work under their contract on July 28, 1989 and their projected licensing expenditures are included in this exhibit totalling $20,879,692.

The General Fund Appropriation from the North Carolina General Assembly to the Low-Level Radioactive Waste Management Authority and the other State agencies directly involved in the project totals approximately $17,400,000 for the 1989-1991 biennium. *The money is designated to be used only when there are no other funds available for this project.* The total of all projected expenditures from the first anticipated date of receiving Capacity Assurance Funds in April 1990, through the receipt of the license on December 31, 1991 is approximately $21,000,000.

ATTACHMENT A

DRAFT PROCEDURE FOR COLLECTION OF PROPOSED CAPACITY ASSURANCE CHARGE

Step 1 The N.C. Low-Level Radioactive Waste Management Authority (Authority) submits a budget to the Southeast Compact Commission (Commission) for the current budget period (i.e. January 1, 1990 to June 30, 1990). In subsequent years, the Authority submits an annual budget to the Commission.

Step 2 After approval, the Commission submits this budget to the South Carolina Budget and Control Board as an amendment to its budget for the purposes of assisting North Carolina in the licensing phase of site development.

Step 3 The South Carolina Budget and Control Board sets the amount of the charge per cubic foot based on the budget of the Authority divided by the number of cubic feet which Chem-Nuclear Systems, Inc. (CNSI) expects to dispose for Southeast generators over the same time period.

Step 4 For each shipment of waste disposed at Barnwell by Southeast generators, CNSI calculates the amount of the charge owed by the generator and bills the generator for this amount on the routine invoice. The charge will be due to CNSI on payment of the invoice (45 days is an average period for payment). Note: the capacity assurance charge will not be built into the base charge since it does *not* apply to generators outside the Southeast.

Step 5 Once a month, CNSI submits to the S.C. Treasurer's office the amount of charges collected from generators over the past month.

Step 6 Once a month, the S.C. Treasurer's Office transmits funds to the Commission for the amount of charges submitted by CNSI that month. This check will be separate from the check for the Commission's operating budget.

Step 7 The capacity assurance charge funds are deposited into an account held separate from the Commission's operating funds.

Step 8 Upon approval of an invoice from the Authority (see "Draft Procedure for Expenditure of the Proposed Capacity Assurance Charge Funds"), the Commission transmits funds to the Authority.

Step 9 CNSI ceases billing generators for the capacity assurance charge at the point in time when they have collected a total of $21,400,000.

ATTACHMENT B

DRAFT PROCEDURE FOR EXPENDITURE OF THE PROPOSED CAPACITY ASSURANCE CHARGE FUNDS

1. Chem-Nuclear Systems, Inc. (CNSI), other contractors and other state agencies invoice the N.C. Low-Level Radioactive Waste Management Authority (Authority) for completed tasks, in accordance with the Work Plan..

2. The Authority invoices the Southeast Compact Commission (the Commission) with an itemized list of work performed by CNSI, other contractors, other state agencies, and the Authority staff.

   The Authority certifies to the Commission Executive Director that the work has been performed and that the work corresponds to the Authority's Work Plan or other legal obligations of the Authority.

4. As soon as possible, but in no event later than ten days after the receipt of the Authority's invoice, the Commission mails a check to the Authority. The check is co-signed by the Commission Executive Director and Secretary-Treasurer. If the amount of the invoice exceeds the amount of capacity assurance charges collected to that date and remaining in the account, the check will be made for no more than the amount remaining in the account.

5. Payments to the Authority shall be deposited in a special segregated fund maintained by the North Carolina State Treasurer. Checks drawn by the Authority shall be debited against the special account.

6. At each Commission meeting, the Authority provides a thorough report of the progress made toward its Work Plan.

APPENDIX E

MINUTES
SOUTHEAST COMPACT COMMISSION
November 15, 1990
Page Five

Commissioner Smith presented three factors that would produce a more successful and cost effective conference which are (1) greater commissioner involvement in working with legislators, (2) repeating the conference location, and (3) avoidance of unnecessary changes to the format and written materials.

The Committee also recommended that this conference not be joined with a commission meeting. The Committee felt that there would be to many conflicts.

In reference to hiring an outside consultant to facilitate the conference, the Committee asked Secretary-Treasurer Captain William Briner and Ben Smith to form a subcommittee to review the consultant's work plan prior to execution of a contract.

In regard to the scheduling of the conference, several dates were offered. September 15 and 16 were chosen for the conference.

Chairman Hodes emphasized early follow-up with legislators on registration for the conference.

New Commissioner W. Tayloe Murphy was appointed as a member of the Public Participation Committee.

Report of the Finance Committee

A. Financing of Regional Facility Development

Captain William H. Briner, Chairman of the Finance Committee, called on Commissioner George Miller, who had chaired a special subcommittee appointed to review the proposal presented in an August 21, 1990 memorandum by

South Carolina commissioners, John McMillan and Heyward Shealy. Chairman Briner commended Rep. Miller and others involved for the hard work expended in in [sic] this effort.

Commissioner Miller made the following motion:

The Finance Committee recommends that the Commission establish an access fee as outlined in the August 21, 1990 memorandum to the Commission from Commissioners McMillan and Shealy, as amended (see Attachment A.)

Notwithstanding, in the event a member state does not establish a mechanism which provides compensation for the access fee within the time provided, the host state shall assess and collect the fee based on volume on an equitable basis for all waste from that state, to be paid by the generators.

The motion was seconded by John McMillan.

Commissioner Ben Smith stated that the original figures from the August 21, 1990 memorandum would have to be adjusted. Chairman Hodes indicated that these figures would be corrected.

Alternate Commissioner Palmer from Mississippi addressed the fact that this motion covers only the first two years, implying that the issue must be revisited for the balance of funds needed.

Captain Briner responded affirmatively to Commissioner Palmer's concern.

Commissioner Godwin requested that "equitable basis" be stated as volume per facility.

Commissioner Miller moved to amend his motion to indicate that they are not authorizing a financial commitment on behalf of the states themselves. Each state is to establish a

mechanism for collecting the access fee. If this is not done, the host state will assess the fee. The word "equitable" is to be substituted to read "equal".

Seconded by Captain Briner.

The amendment was approved unanimously.

Commission [sic] Setser, speaking to the motion, reiterated that this does not imply that the Commission is placing a financial liability on the state itself.

Commissioner stated that the process is to be put into place on January 1, 1991.

The motion as amended was voted on by roll call. The affirmative vote was unanimous.

Commissioner Miller thanked South Carolina for submittal of the proposal and expressed appreciation of the member states in regard to the financial burden of this project. Commissioner Briner thanked the commissioners for their efforts and Commissioner Hodes thanked Captain Briner for his work with the Finance Committee on this issue.

B. Prudence Evaluation

Captain Briner stated that the Finance Committee recommends that a professional services contract be made with Ernst & Young for a diagnostic evaluation of the North Carolina Low-Level Radioactive Waste Management Authority's costs. The cost for this evaluation will approach $50,000.

The commissioners discussed the motion. Alternate Commissioner Palmer asked for clarification on the need for the contract.

Commissioner Smith indicated that possibly this evaluation will give suggestions for stretching the funds over a longer period of time and ways to possibly cut costs.

Commissioner Godwin would like indication that these are reasonable expenses.

Attachment A

(text of 8/21/90 memorandum, amended 11/15/90)

As you know, the Southeast Compact Finance Committee has been discussing the concept of establishing an access fee in addition to the current capacity assurance charge for collecting revenues to develop the second regional disposal facility for the Southeast Compact.

The suggested alternative places too great a burden on generators who are trapped in a fixed price situation with little if any ability to adjust prices to absorb major increases in cost. As a result, these generators will either reduce shipping by utilizing expanded storage or, in extreme cases where storage is not a viable option, go out of business. We do believe an access fee alternative is an option, but only if implemented in an equitable manner. We also believe each member state of the Compact is best suited for determining the most equitable means for developing this system.

Article 3(B) of the Southeast Compact is the appropriate provision for the establishment of a mechanism for access fees: "if no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party-state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host state or states and approved by a two-thirds vote of the Commission."

South Carolina, as the host state to the regional facility is proposing all state in the Southeast Compact pay an annual access fee based upon proportional volumes from each state beginning with the last quarter of 1989 and the first three quarters of 1990, adjusted on a quarterly basis thereafter. Further, the state access fee is payable to the State of South

Carolina beginning January 1, 1991 through December 31, 1992. The amount to be raised during this time period is $12 million.

This proposal will allow individual sates to equitably adjust charges or fees for generators within their borders and allow implementation and administration of the access fee to be streamlined. Further, it is proposed any access fees collected by South Carolina and invested in the North Carolina Low-Level Radioactive Waste Management Authority be returned in the form of a user credit after the opening of the next host state facility.

RESOLUTION

TO ESTABLISH AN ACCESS FEE ON SOUTHEAST GENERATORS FOR THE PERIOD JANUARY 1, 1993—DECEMBER 31, 1995

Adopted by the Southeast Compact Commission
November 13, 1992

In order to assure the continued development of the second regional disposal facility for low-level radioactive waste ("LLRW") in North Carolina, the Southeast Compact Commission ("Commission") must take appropriate action to furnish additional funds for use by the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of site development in North Carolina. Development of the North Carolina facility will assure the availability of a disposal site for all Southeast generators.

The Commission has established a policy for the importation of out-of-region waste, including the imposition of an import fee. However, the volume of out-of-region LLRW and the amount of revenue generated from out-of-region LLRW is uncertain. The North Carolina siting process must move

forward independent of any policy related to, or revenue derived from the importation of out-of-region LLRW. Because the cash flow requirements of the Authority must be met in a timely manner during 1993-1995, fees will be assessed on all Southeast LLRW generators during that period.

The Finance Committee recommends that the Commission establish an access fee, to be levied on all Southeast LLRW generators at a rate sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993-December 31, 1995. Fee collection shall be in accordance with the attached "Mechanism to Collect Revenues During the Period January 1, 1993-December 31, 1995 for Continued Development of the Second Regional Disposal Facility for the Southeast Compact Region."

MECHANISM TO COLLECT REVENUES DURING THE PERIOD JANUARY 1, 1993 - DECEMBER 31, 1995 FOR CONTINUED DEVELOPMENT OF THE SECOND REGIONAL DISPOSAL FACILITY FOR THE SOUTHEAST COMPACT REGION

An access fee will be collected during the three year period January 1, 1993-December 31, 1995 for the purpose of funding the continued development of the second regional disposal facility in North Carolina.

Article 3 (B) of the Southeast Compact is the appropriate provision for the establishment of a mechanism for an access fee:

> "if no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party state without such facilities may be required by the host

state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host state or states and approved by a two-thirds vote of the Commission."

Generators in all Southeast Compact states will be assessed an access fee based upon each state's percentage of Southeast Compact waste disposed at the Barnwell site during the previous twelve months. Further, the state access fee is payable to the State of South Carolina for the twelve quarters beginning January, 1993 and ending December 31, 1995. The amount to be raised during this time period is $3 million each quarter, for a total of $36 million.

Each state may establish a mechanism for determining the amount of access fee assessed against individual generators within that state. In the event a member state does not establish a mechanism for assessment, the host state shall assess and collect the fee based on the method described herein.

This mechanism will allow individual states to equitably adjust charges or fees for generators within their borders and allow implementation and administration of the access fee to be streamlined. Further, it is proposed any access fees collected by South Carolina and invested in the North Carolina Low Level Radioactive Waste Management Authority be returned to the generators in the form of a user credit after the opening of the next host state facility.

Generators within states of the Southeast Compact will be assessed quarterly. Fees will be billed on the fifteenth day of the month immediately preceding the first day of each quarter in the assessment period. Generators shall be expected to pay such fees by the fifteenth day of the first month of each quarter, regardless of whether they plan to use the existing regional disposal facility in Barnwell, South Carolina during the quarter in question.

Access fees shall be calculated and collected by Chem-Nuclear Systems Inc. (CNSI) on behalf of the State of South Carolina. Fees shall be calculated and assessed according to the following procedures.

PROCEDURES

Fee Calculation and Assessment

The initial assessment will be based on the volume of waste disposed during the fourth quarter of 1991 and the first three quarters of 1992. The second assessment will be based on volumes of waste disposed during the first quarter 1992 through the fourth quarter 1992, and adjusted on a quarterly basis throughout the assessment period.

The total amount of access fees to be collected each quarter shall be determined by dividing the total amount of revenues needed by twelve quarters. Access fees will be apportioned first to each state and then assessed to each generator within the state based upon the mechanism established by that state.

On December 15, 1992, the first quarterly statement will be distributed by South Carolina for the Commission. Such statement shall show the total amount of the quarterly access fees apportioned to the state. The statement shall also include a breakdown of the quarterly volumes and the access fees to be assessed against each individual generator in each member state.

The total amount of the access fees apportioned to each member state for the quarter shall be determined by using historical disposal data from the Barnwell, South Carolina facility. The member state's share of the total shall be determined in the following manner:

1) Calculate the state's percentage of waste disposed at the Barnwell facility: Divide the volume of waste disposed by the state's existing generators at the Barnwell facility during the previous twelve months by

the total volume of waste disposed at the Barnwell facility by all existing Southeast generators during the same period.

2) Multiply the state's disposal percentage by the total quarterly revenues to be assessed against all existing Southeast generators to determine the total access fees apportioned to that state.

Except in the case of a state which establishes a different mechanism, the quarterly access fees assessed against individual generators within the state shall be determined in the following manner:

1) Calculate the generator's percentage of the state's waste disposed at the Barnwell facility: Divide the volume of wastes disposed at the Barnwell facility by the individual generator during the previous twelve months by the total volume of waste disposed by all the state's generators during the same period.

2) Multiply the generator's percentage of state waste disposed by the total state access fee to determine the quarterly fee assessed to the generator.

Data Requirements

The most recent available twelve months (four quarters) of disposal data from the Barnwell, South Carolina regional facility shall be used in all calculations of access fees. During quarterly adjustments of access fees, disposal data will be updated, omitting the oldest quarter and incorporating the most recent quarter.

Fee Administration

Generators will remit access fee payments to CNSI. The regional access fees received by the Southeast Compact Commission will be administered in accordance with the procedures for expenditures now in effect for the access fee.

Regional Facility Access Fee Enforcement

Generators who fail to remit access fee payments by the fifteenth day of the first month of each quarter shall be considered in violation of Article 3(B) of the Southeast Compact as stated above and will be subject to any or all of three sanctions:

1) Unpaid access fees will accrue interest at the rate of one percent per month until paid.

2) After being provided thirty days notice, generators may be denied access by the host state to the Southeast regional disposal facility until access fees and accrued interest are paid in full.

3) Generators may be denied certification to export wastes outside the Southeast region until fees and interest are paid in full. This applies only to waste not accepted at the Southeast regional disposal facility due to license requirements.

Appeals

An appeals process will be available to existing generators or states who believe access fees have been determined based upon erroneous disposal data. Appeals must be filed in writing to the Southeast Compact Commission Office within thirty days of billing. Collection of disputed access fees and the imposition of sanctions shall be stayed until the appeal is reviewed by the Commission. If disposal data is in error, revised charges are due 30 days after the new bill is mailed. Charges which are found to be proper during the review will be due (with interest at the rate detailed above) within thirty days of mailing of the appeal review results.

Exemptions

Any generator who shipped to Barnwell during the base period and who demonstrates to a subcommittee of the Finance Committee that it will not utilize a regional facility

after 1992 will be excluded from the historical disposal data from the Barnwell facility that will be used for computing each state's share of the access fee. The subcommittee will consist of the Chairman of the Finance Committee, Commissioner Roberts and Commissioner Hodes.

Each state may provide for exemptions for other reasons through the mechanism it chooses for allocation of its share of the access fee to the generators within that state.

Contingencies

The collection of revenues for site development of the second regional disposal facility in North Carolina will be contingent upon the following:

All costs for site development incurred by the Authority are continually monitored and deemed reasonable and prudent by the Southeast Compact Commission;

The Southeast Compact Commission continually monitors and concurs that satisfactory progress is being made in the North Carolina site development process;

Any cost increases or schedule delays are immediately reported and justified to the Southeast Compact Commission by the Authority;

In the event that the revenue requirements from Southeast generators destined for site development by the North Carolina Low-Level Radioactive Waste Management Authority have either increased or decreased and these changes are deemed reasonable and prudent by the Southeast Compact Commission, the Commission may elect to alter the total revenues collected by the Regional Facility Access Fee.

SUMMARY OF THE MECHANISM:

1. The purpose is to meet the cash flow requirements of the NCLLRWMA without relying on revenue derived from importation from out-of-region.

2. Continues the existing access fee mechanism with some "fine tuning" to address the problems encountered and clarify the original motion adopted 11/15/90.

3. Covers three year period January 1, 1993-December 31, 1995.

4. Provides for assessment of $3 million per quarter, for a total of $36 million.

5. Does not include provision for the rollover of unpaid fees to the following quarters.

6. Provides for exemptions for those generators who are included in the base period data and who can demonstrate that they will not utilize the Barnwell facility after 1992 for purposes computing each states [sic] share of the access fee.

7. Includes clarification language on enforcement, appeals and contingencies which were not specifically included in the 11/15/90 motion.

8. Provides for faster more efficient transfer of fees from CNSI to South Carolina and on to the Commission.

APPENDIX F

COMMISSION MINUTES
September 28, 1992
Page Two

Approval of Minutes

The minutes of the August 14, 1992 meeting were approved as written.

Chairman Hodes asked for any comments related to agenda items. Ms. Janet Hoyle, Director of the Blue Ridge Environmental Defense Fund, a grassroots environmental organization in North Carolina, stated that people across North Carolina were becoming aware of political and economic pressures for fewer sites across the nation. Because North Carolina has been selected as the host state for the largest compact, they feel North Carolina is at great risk for becoming a national waste dump. She urged the Southeast Compact to ban the importation of waste from states or generators outside the region.

Mr. Lance Lloyd, representing GP Nuclear, stated that GP Nuclear has companies in two compacts. They are requesting that the import policy be changed to allow them to combine their wastes into one report. GP Nuclear is contributing approximately $7M towards this project

Treasurer's Report

Captain William Briner, Chairman of the Finance Committee, reported that the Finance Committee had been requested to address two aspects of the Import Policy. They are the amount of the access charge and the mechanism for collection of that charge. As proposed by the Finance Committee, Captain Briner made a motion that an access fee in the amount of $220/cu. ft. be accepted by the Commission.

The motion was seconded by Commissioner Shropshire and the vote was unanimously in favor of the motion.

Captain Briner then proposed that Section V. of the Draft Import Policy be approved with the changes as adopted in the Finance Committee meeting (copy attached). The motion was seconded and approved unanimously.

Planning Committee

Chairman Jim Setser gave the background for the development of the Import Policy. At the July 15-16 meeting of the Planning Committee it was decided that an Import Policy Group needed to be established to develop an Import Policy. The group was appointed July 30, 1992, and is made up of the three members of the Planning Committee, Jim Setser, Mike Mobley, Carl Roberts, and Richard Hunter. The group collected information from August 1-12 to be used for pre-draft materials. At the Planning Committee meeting on August 13, 1992, a framework resolution was recommended and passed on August 14 by the Southeast Compact Commission. The public was then made aware of the passage of this resolution and requested to submit their response to this resolution. The Import Policy Group met again on August 31, 1992 to receive more information from generators and the public. The Group also met with attorneys to discuss the legal aspects of this Policy. The Group met this morning to further consider the policy.

[Page Three]

Commissioner Setser stated that the following criteria were used in development of the Policy:

Does it promote public health and safety?
Is it of benefit to the Southeast Compact?
Is it non-discrimatory?
Is it legally defensible?
Is it reasonable?

Is it fair?
Is it the right thing to do?

Two major areas arose for discussion. One is the extent to which the Southeast Compact will provide incentives for progress in the national compacting process. The other area is the requirement that access be contingent on a contract between the Southeast Compact and the Region/State. Commissioner Setser then recommended that the Commission adopt the Import Policy which includes a contract and that authority be given to the Executive Director to execute the contracts, not inclusive of negotiations.

After much discussion, Chairman Hodes asked for a second to the motion which was given by Ben Smith.

Tayloe Murphy, Virginia Commissioner, expressed concerns between provisions in Section III. Access Policy and the provision in the contract that allows the Commission to terminate an access agreement for any reason. He indicated that it was unclear who would determine whether or not the other region or unaligned state has actively pursued the spirit of the LLRWPA.

Commissioner Murphy moved that the following wording be added to paragraph three of Section III.

> . . . The Southeast Compact Commission shall make the determination whether or not a region or unaligned state has actively pursued the spirit of the Low-Level Radioactive Policy Act and such determination shall be final and binding on all parties and not subject to contest by the region or unaligned state or other persons.

The motion was seconded by Bernard Caton. The motion was defeated with only two affirmative votes.

Commissioner Murphy made a motion that in paragraph 12 of the contract that the phrase "the jurisdiction over its or his

person of all" be changed to "venue in the". Seconded and approved unanimously.

Commissioner Roberts made a motion to add language on page 6, Section III., of the Import Policy to read as follows:

[Page Four]

> A report shall be submitted by each region and unaffiliated state that contracts for access with the Southeast Compact within thirty days of execution of the contract and shall include the following items at a minimum:
>
> a. Legislation enacted to enable siting activity;
>
> b. Entities responsible for siting activities;
>
> c. Resources committed to site development;
>
> d. Progress made since 1985 in siting a disposal facility or negotiating for access after June 30, 1994;
>
> e. A copy of the current siting plan for the state/region.

The motion was seconded and approved unanimously.

Commissioner Roberts made a motion that the contract be amended in item #3 to include the following:

> Within thirty days of the execution of this contract, the_____Region (State) shall submit the following information at a minimum:
>
> a. Legislation enacted to enable siting activity;
>
> b. Entities responsible for siting activities;
>
> c. Resources committed to site development;
>
> d. Progress made since 1985 in siting a disposal facility or negotiating for access after June 30, 1994;
>
> e. A copy of the current siting plan for the state/region.

The motion was seconded and adopted.

Commissioner Setser brought up an issue previously discussed but not decided upon related to signing of the contract. Mr Setser made a motion that the wording in Section IV., Part B, second sentence, read as follows:

> After the Commission authorizes a contract for access with an applicant state or compact, the Executive Director will mail a contract to the applicant state/compact for signature. Upon receipt of the signed contract from the applicant state or contract, the Executive Director is authorized to sign the contract.

The motion was seconded and approved with two negative votes from the South Carolina commissioners.

[Page Five]

Commissioner Mike Mobley made the following amendment to the motion approved above.

> . . . . Upon receipt of the signed contract, the Executive Director is authorized to execute the contract on behalf of the Southeast Compact Commission, assuming that no changes have been made to the contract by the applicant state or compact. In those cases where the contract is required by the applicant state or compact to be signed first by the Southeast Compact Commission, the Executive Director and Chairman are so authorized. A contract for access will be effective as soon as it is signed by both parties and received by the Southeast Compact Commission.

The motion was seconded and approved.

Dr. Hunter suggested that the Chairman be added as a signee in addition to the Executive Director.

Dr. Hunter's motion was seconded and approved.

Kathryn Visocki asked for direction in communicating that the contract is non-negotiable. It was suggested that this be explained to [sic] a cover letter.

A roll call vote was given on the Policy/Contract as amended. The vote was unanimous approving the Policy/Contract.

New Business

Dr Hodes requested that the Commission consider that the Import Policy Group be formalized into the Import Policy Committee with the same members and Jim Setser as Chairman of the Committee. Captain Briner made the motion with a second by Ben Smith. This motion was approved unanimously.

Mike Mobley requested that the committee who studied the Aerojet request for exemption from fees (Palmer, Hunter and Mobley) give a report on the Aerojet situation. Dr. Hunter gave background as to Aerojet's request for an exemption. He stated that Aerojet would possibly have to close their facility with a loss of 170 jobs as a result of the inequity caused by the S C. law requiring fees from generators outside of South Carolina. He called on Mr. Brad Squibb of Aerojet to give a status report on the current situation.

Mr. Squibb reported that an extension had been granted on the bid proposal. One hundred percent (100%) of the contract will be awarded to one contractor. They have retained $59/cu.ft. in escrow and plan on paying that. Because of this, they have laid off 56 people * * *

* * *

APPENDIX G

COMMISSION MINUTES
November 13, 1992
Page Three

Finance Committee Report

Captain Briner presented the following motion:

> In order to assure the continued development of the second regional disposal facility for low-level radioactive waste ("LLRW") in North Carolina, the Southeast Compact Commission ("Commission") must take appropriate action to furnish additional funds for use by the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of site development in North Carolina. Development of the North Carolina facility will assure the availability of a disposal site for all Southeast generators.
>
> The Commission has established a policy for the importation of out-of-region waste, including the imposition of an import fee. However, the volume of out-of-region LLRW and the amount of revenue generated from out-of-region LLRW is uncertain. The North Carolina siting process must move forward independent of any policy related to, or revenue derived from the importation of out-of-region LLRW. Because the cash flow requirements of the Authority must be met in a timely manner during 1993-1995, fees will be assessed on all Southeast LLRW generators during that period.
>
> The Finance Committee recommends that the Commission establish an access fee, to be levied on all Southeast LLRW generators at a rate sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993 - December 31, 1995.

> Fee collection shall be in accordance with the attached "Mechanism to Collect Revenues During the Period January 1, 1993–December 31, 1995 for Continued Development of the Second Regional Disposal Facility for the Southeast Compact Region."

The motion was seconded by Carl Roberts.

Mike Mobley requested that a subcommittee of the Finance Committee be established to look at the process and put into place standards for fee programs so that there is a set mechanism to deal with these fees.

Dr. Hodes said that this could be established as a staff function to put together a chart outlining the details of each of the fees.

Dr. Hodes called for a roll call vote which was unanimously in favor of the motion.

APPENDIX H

COMMISSION MINUTES
April 29, 1994
Page Six

information, because we have both John Mac Millan and Dayne Brown here, has been presented. I think the real important part is that we have obtained the assurances and, of course, you heard in the Finance Committee Meeting which we will have a report soon, that we have acted, we've got a tentative recommendation on their funding request."

Commissioner George Miller reported that Governor Hunt continues to support the process. The Joint Select Committee on Low-Level Radioactive Waste continues to meet on a regular basis. At the April 15 meeting, the committee reaffirmed the work of the Compact Commission by issuing a Statement of Policy. (Attached)

Report of the Planning Committee

Chairman Setser reported that the Planning Committee met and determined that the Proposed Budget for 94-95 was in line with the goals of the Five-Year Strategic Plan. This report was made to the Finance Committee.

Report of the Finance Committee

Chairman Briner presented the Budget for Fiscal Year 94-95 which was approved unanimously with no discussion. Capt. Briner then presented two requests from the North Carolina Authority for funding.

The first motion was approved unanimously:

The Commission grants the request from the North Carolina Authority for advancement of funds from the Regional Access Fee when necessary on a documentated basis not to exceed a total of $3 Million. The advance will be paid out of

the accummulated [sic] funds of the Compact share of the Out-of-Region Access Fee and will be repaid to the Out-of-Region Access Fee fund from the Regional Access Fees collected in the future

The second motion was approved unanimously:

The Commission shall approve the transfer of up to $7 million to North Carolina on an as-needed basis. The Chairman will appoint a group composed of the Chairman, the Treasurer, the Chairman of the Monitoring Group and any other Commissioners or Alternate Commissioners interested who will, by telephone and/or fax, evaluate the information provided to establish that the need for each payment has been documented. The written approval by a majority of the group will be required to authorize the actual expenditure of each requested payment.

APPENDIX I

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

January 5, 1996
The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

Since 1983 we have been working together to provide a safe and economical low-level radioactive waste (LLRW) facility needed by southeast industries and institutions. I would like to apprise you of several developments which may affect how we fulfill our responsibilities to southeast waste generators and rate payers in the future. I am also corresponding with Lieutenant Governor Wicker, President Pro Tem Basnight, Speaker Brubaker, and Co-Chairmen Conder and Dickson of the Joint Select Committee on LLRW to relay the same information.

Allow me first to review for you the history of the Southeast Compact and the statutory responsibilities of its members. In 1983, the states of North Carolina, Alabama, Florida, Georgia, Mississippi, South Carolina, Tennessee, and Virginia entered into a cooperative agreement to form the Southeast Compact, which was ratified by Congress in 1985. The Compact allows the southeast states to exclude out-of-region wastes from disposal at in-region facilities. South Carolina was to serve as the Compact's first host state with the Regional Facility at Barnwell slated to close at the end of 1992.

In 1986, the Compact selected North Carolina as the second host state. The designation of North Carolina as the second host state obligates North Carolina to develop a facility for disposal of the Region's low-level radioactive waste for a period of twenty years. The Compact Law required that this facility be developed in no event later than 1991 and gave the host state the responsibility for financing, siting, and licensing the facility. North Carolina put a siting process in place and in late 1992 the North Carolina Authority submitted a license application for the Wake County site. The license application has been under review for three years by the North Carolina Division of Radiation Protection and there are no indications when the review will be complete.

A total of more than $85 million has now been expended on site development in North Carolina. Over the past five years, the Southeast Compact Commission has provided [page 2] $55 M toward those efforts. North Carolina is now five years beyond the 1991 statutory deadline for opening a regional disposal facility. Recently the Commission has received conflicting reports from state agencies in North Carolina regarding the likelihood of licensing the Wake site and the resources required to do so. We understand that the North Carolina Authority plans to decide in late January whether to proceed with efforts to obtain a license for the Wake County site.

The State of South Carolina withdrew from the Compact in July 1995. At that time, the Commission lost its traditional source of revenues from operation of the regional facility in Barnwell. The loss of these revenues severely diminishes the Commission's ability to assist North Carolina in meeting its responsibilities for funding and developing a LLRW disposal site.

In response to the concerns over project uncertainties, escalating costs and dwindling resources, the Commission

took several actions in recent months to conserve resources while it evaluates the existing situation.

In August 1995 the Commission passed a resolution expressing its sense that further funding to the project would be contingent upon the contractor's (Chem-Nuclear Systems) financial investment in the project. The resolution was transmitted to the North Carolina Authority that same month. At a subsequent meeting in November 1995, the Commission reaffirmed its position in a resolution which prohibited consideration of the release of any further funds until a response from the contractor is received and until a comprehensive site assessment report is provided by the North Carolina Low-Level Radioactive Waste Management Authority which includes the scope, cost and length of time required to pursue a licensing decision.

The Commission also adopted new requirements for the release of funds. In the future, contractual agreements must be established for funding releases. In addition, the expenditure of funds for site development must be conditioned upon the achievement of siting goals. Also passed was a requirement that North Carolina develop a business plan for site development, which includes the projected costs and timetable for developing a regional facility in North Carolina.

The development of a Regional Disposal Facility in North Carolina is critical to the success of the Southeast Compact. After the North Carolina facility becomes operational, the Compact Law prohibits member states from withdrawing from the Compact. This secures the Compact's membership and the member states' future obligations to host regional facilities for the Compact. In addition, the opening of a new regional facility ensures a source of revenues for future Compact operations and a potential source of revenues for site development in the third host state. If the [page 3] Commission depletes its reserve funds and site development

is not yet complete in North Carolina, the Compact's future livelihood will be jeopardized.

Many of the recent actions taken by the Commission are a direct result of increasing constituent concerns about the direction of the North Carolina project. At recent forums for southeast waste generators and other citizens, concern was expressed over increasing costs and delays, the open-endedness of the siting process, the lack of overall accountability for the project, and how North Carolina will fulfill its responsibilities when the Commission is no longer able to fund the process. In addition, we are told that if costs continue to escalate, prohibitive disposal rates may lead many generators to store at their individual sites rather than pursue safer centralized disposal.

The Southeast Compact has entrusted North Carolina with the task of providing a facility for safe and economical disposal for our industries, utilities, academic and medical institutions and ratepayers. To this end, the Commission has provided $55 M in financial support to North Carolina. Future Commission resources, however, will be far more limited and will be subject to competing needs. In addition, any funds released will be based upon contractual agreements and other requirements. At some point, Commission funds will no longer be available to North Carolina for site development, and North Carolina will need to make alternate plans for fulfilling its obligations to the Compact. Please be advised that it will be necessary to begin considering the alternatives available to you for meeting these obligations.

I would like to express the Commission's continuing support for the site development efforts in North Carolina. If there is anything further the Commission can do to assist you in your efforts, please contact me.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: George Miller
William H. Briner

APPENDIX J

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

April 25, 1996

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-5001

Dear Governor Hunt:

Thank you for your letter of April 8, 1996 in which you assure me that North Carolina remains committed to fulfilling its obligations under the Southeast Compact. I would like to ensure that there is no misunderstanding as to the nature of those obligations.

Both your letter and statements made by Mr. Steve Levitas while chairing the April 18 meeting of the Inter-Agency Committee suggest that you expect the Compact Commission to take an active role in site selection decisions in North Carolina or make a decision which would relieve North Carolina of its host state obligations. You state in your letter that if "the future of the project is in jeopardy . . then I suggest the Compact Commission move immediately to determine how best to address this problem." Mr. Levitas asked, "At what juncture will the Authority and the Commission make a decision about whether this project will go forward?" In my view, both of these statements misrepresent the role of the Commission as defined by North Carolina statute.

It is the Compact Commission's mandated role to select a host state and ensure that the selected state develops a

facility. North Carolina statute makes it clear that the Commission should not dictate to the host state any specifics of the siting process such as location or technology The Commission selected North Carolina as the host state and has monitored progress in North Carolina, being extremely careful not to dictate to the host state how to do its job. It is the responsibility of the host state to site, license, build and operate the facility, and that responsibility includes providing the necessary funding. While the Commission has provided funding voluntarily, it is under no statutory obligation to do so.

As I pointed out in my letter of January 5, North Carolina must consider the possibility that the remaining funds available from the Southeast Compact Commission may not be sufficient to complete the project and must plan accordingly to secure funds to complete the project and fulfill the State's obligation to the region. You state in your letter that you would not recommend to the General Assembly that it "assume a greater portion (of) the financial responsibility for the project than it has done to date."

[page 2] However, by enacting the compact into law the General Assembly already assumed responsibility to fund the project to completion. To suggest that the General Assembly not provide further funding is to suggest that the State disregard its agreement with six other states.

North Carolina entered the Southeast Compact voluntarily, knowing that it would be required to take its turn as a host state. As a part of the host state selection process and before North Carolina was selected as host state, all states were formally given a period of time in which to demonstrate to the Commission that no land suitable for a disposal site was available in the state. No state made such a demonstration.

I would like your help understanding two issues raised by your letter. You stated that North Carolina remains

committed to fulfilling its obligations, yet go on to say that North Carolina will not fund the work, and this lack of funding will place the project in jeopardy, a problem you suggest the Commission would have to address. I would be most interested in knowing how you reconcile this apparent contradiction.

If I am interpreting your statements correctly and you do expect the Compact Commission to take an active role in site selection decisions in North Carolina and/or make a decision which would relieve North Carolina of its host state obligations, the Commission would be interested in learning which specific section of the statute authorizes it to take such actions. If this is not your intended meaning, we would appreciate a clarification of your statements.

We look forward to receiving your reply.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Southeast Compact Commission
Rep. George W. Miller, Jr.
Capt. William H. Briner
Rep. Dub Dickson
Sen. Richard Conder
Warren Corgan
John MacMillan
Steve Levitas
Dayne Brown

APPENDIX K

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

May 10, 1996

The Honorable James B. Hunt Jr.
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Southeast Compact Commission will meet in June to consider continued funding for development of the regional low-level radioactive waste disposal facility in North Carolina. Commissioners have raised a number of different mechanisms for continued funding of the facility. At least one of those options would involve payment of funds to North Carolina after specific actions were completed. Such a mechanism would necessitate immediate action by the North Carolina General Assembly to appropriate funds to enable the project to move forward without interruption or delay.

While the Commission has provided funding voluntarily, it is under no statutory obligation to do so It is the Compact Commission's mandated role to select a host state and ensure that the selected state develops a facility. By statute, the Commission is not responsible for any of the costs associated with the development or operation of the facility. It is the responsibility of the host state to site, license, build and operate the facility, and that responsibility includes providing the necessary funding..

Furthermore, there is the possibility that the remaining funds available from the Commission may not be sufficient to

complete the project. If that is the case, the General Assembly would also need to act to provide funds to complete the project in order to fulfill the State's obligation to the region.

If you wish to discuss this information further, members of the Commission or its staff are available to meet with you.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

Identical originals sent to: Sen. Marc Basnight
Rep. Harold Brubaker
Sen. J. Richard Conder
Rep. Walter Dickson

cc: Southeast Compact Commissioners
Steve Levitas
John Mac Millan

APPENDIX L

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

June 14, 1996

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission
For Low-Level Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

I am writing in response to your letters of April 25 and May 10, 1996. In those letters you state that it is North Carolina's responsibility, as the next host state selected by the Southeast Compact Commission, to site, license, build, and operate a regional low-level radioactive waste (LLRW) facility *and* to provide the necessary funding for that purpose.

Your assertion that North Carolina law somehow obligates the State of North Carolina to fund a regional LLRW facility is incorrect. North Carolina law states explicitly that all costs associated with this project should be borne by the waste generators who would be served by a regional facility. N.C. GEN. STAT. § 104G-15(a). To date, the Compact Commission has provided a means to carry out that State law, which I continue to believe is sound policy. Further, one overarching policy goal of the Compact, also codified as North Carolina law, is to "distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states." N.C. GEN. STAT. §104F-1 [COMPACT ART. I].

Although the Compact itself in no way obligates this or any other state to pay for a regional facility, as you note, the Commission has recently suggested that *future* funding might be premised on some sort of contractual commitment by North Carolina. This position recognizes that there is no existing enforceable obligation, under the Compact or otherwise, between this State and the Commission or other party states. In fact, the various noninterference and termination provisions of the Compact, to which you allude in your letter of April 25, clearly remove any funding or other enforceable obligations as a legal matter.

The Compact Commission has appropriately provided more than $70 million in project funding to date. In doing so, the Commission no doubt recognized that such funding was essential to the project, which I believe would be the case if any other Compact member were the next host state. North Carolina shares an interest with the Commission and the other party states [page 2] in seeing that a regional LLRW facility is licensed, that it is safe, and that it is funded by waste generators in an equitable manner. North Carolina has provided almost $30 million in support of the project and continues to fund the Authority and regulatory agencies at approximately $2 million per year. However, as stated in my April 8 letter, North Carolina is not prepared to assume a greater portion of the project costs. If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not be able to proceed.

My warmest personal regards.

Sincerely,

/s/ James B. Hunt

James B. Hunt Jr.

cc: Hon. George W. Miller.
Capt. William Briner
Warren Corgan
John MacMillan
Steve Levitas
Dayne Brown

APPENDIX M

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

July 18, 1996

Richard S. Hodes, M.D.
Chairman
Southeast Compact Commission
21 Glenwood Avenue, Suite 207
Raleigh, NC 27603

Dear Dr. Hodes:

In response to your letter of July 18, 1996, I would like to state that my office has repeatedly responded to your communications.

I want to re-affirm that North Carolina is ready to go forward with a licensing work plan agreed to by all parties and we have restated our position that funding must come from or through the Southeast Compact Commission.

North Carolina Commissioner Miller at the June 18, 1996, meeting requested $4 million necessary to go forward with the first phase of the work. I am advised that Mr. MacMillan, Executive Director of the Authority, made clear what would occur if the funding request was denied.

The Commission turned this down. If the project is delayed, it will be the result of the Commission turning down the funding request.

We have been represented on the Commission by Representative George Miller and Captain William Briner. They attend all meetings and are readily available to receive any messages from the Commission.

Sincerely,

/s/ James B. Hunt
James B. Hunt, Jr.

APPENDIX N

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Law-Level Radioactive Waste Management

July 9, 1996 HAND DELIVERED

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

Thank you for your letter of July 3, 1996, in which you expressed interest in resolving the remaining issues between the Commission and the State of North Carolina so that we can go forward with the work of establishing a low-level waste disposal facility.

We acknowledge your recognition of State Representative George W. Miller and Captain William H. Briner as representatives of North Carolina on the Southeast Compact Commission. As charter members of the Commission, they have worked closely with us for thirteen years, are knowledgeable of the issues and valued participants in the Commission's deliberations. For this reason, and because of procedural issues and possible constitutional issues of incompatibility of office, it was the intent of our June 18 resolution that you appoint a separate individual or agency to negotiate on behalf of the State with the Commission as a whole.

We are concerned that the value of participation by Commissioners Miller and Briner as Commissioners will be lost if they are placed in the position of negotiating with a Commission on which they serve. At some point, Commissioners will need to evaluate the work of the

negotiators. This may create an uncomfortable situation for Commissioners Briner and Miller if they must judge their own work, and possibly a procedural problem in voting. In effect this would take away from the Commission the contributions of two valuable Commissioners.

We need the knowledge and expertise of Captain Briner and Representative Miller as members of the Commission and do not wish to sacrifice the benefit of their participation. Rather, we respectfully request that you appoint another individual or agency to negotiate with the Commission on behalf of the State of North Carolina.

The Commission recognizes the urgent need to provide funding to preserve the project team and we stand ready to make available up to one million dollars in interim funding to the North Carolina Low-Level Radioactive Waste Management Authority as soon as we receive notice of your appointment. Like you, we are eager to resolve the remaining issues so that we may move forward.

We look forward to your reply.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
John Mac Millan
Steve Levitas

APPENDIX O

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

July 18, 1996 DELIVERED BY COURIER

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Commission is disappointed and dismayed by your lack of response to our correspondence to you dated July 8, 1996. Having heard no official response, the Commission could not make the necessary funds available to the North Carolina Low-Level Radioactive Waste Management Authority. North Carolina's inaction has placed the entire project in jeopardy.

Certainly you are aware that, as a consequence of the State's lack of response, the project has already begun to shut down. Our Executive Director and I have had recent conversations with your Chief of Staff, and I am told you have received a briefing from the Authority's Chairman and a letter from the Authority's Director describing the initiation of activities to suspend project operations and close the project site. Indeed, today is the last day of operations for the Raleigh office of the project applicant, Chem-Nuclear Systems, Inc.

If the project to develop a low-level radioactive waste disposal facility for the Southeast region is compromised by this inaction, it is clearly not the responsibility of the Southeast Compact Commission.

I have communicated to your Chief of Staff and your Scheduler that I am prepared to travel to North Carolina to

meet with you personally to discuss how to keep the project moving forward. I can assure you that the Commission remains committed to its previously communicated position to provide resources to the State for this purpose. I urge you to make the time available in the coming week for such a meeting.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
John Mac Millan
Steve Levitas

APPENDIX P

MINUTES OCTOBER 3, 1996

[page 2] * * * dramatic improvement in the working relationship between the Authority and the regulators. He expressed a need to recognize disposal opportunities throughout the nation and a need to pursue co-funding by the contractor and North Carolina. Mr. Pugh expressed concern that the motions pending action by the Commission today do not address the issue of co-funding by North Carolina. He stated that there was no urgency in giving additional funding to North Carolina without having the capability of completing the process.

Mrs. Mary MacDowell, Chatham County Preferred Site Local Advisory Committee, reminded the Commission that the two scientific endorsers of the Licensing Work Plan stand to gain financially if funds are provided by the Southeast Compact Commission. The geologists representing Wake County and Chatham County do not believe the site meets the requirements for licensure. Mrs. MacDowell informed the Commission that nine candidates for the North Carolina General Assembly had held a press conference indicating their desire to stop the process and withdraw from the Compact.

Mr. Ken McCracken, an employee of Southern Nuclear Operating Company and chairman of the Southeast Utilities Generators Group (SEGG), stated that the recommendations presented by the SEGG at the last Commission meeting still stand. He stated that despite changes in waste disposal, utilities have a need for disposal of decommissioned waste. He stated that the SEGG wants to move forward and expressed the need for continuity and affirmative action today with regard to funding.

Unfinished Business

Chairman Hodes recognized Commissioner Setser to speak to his amendment to the substitute motion. Mr. Setser acknowledged that he found his amendment did not contain some elements he desired and, instead, offered an amendment to Peter Schmidt's motion to strike the existing language and substitute the following language:

> The Commission authorizes the release of funds to the North Carolina Low-Level Waste Management Authority ("Authority") on a quarterly basis to cover amounts expended by the Authority in performing the work described in the Licensing Work Plan (LWP), dated May 31, 1996. Release of the funds necessary to reach decision point number 2 is subject to compliance with and ongoing adherence to the following terms and conditions as certified by the Monitoring Committee of the Commission:
>
> CONDITION No. 1—The establishment of a clear commitment by the Authority to maintain cost and schedule performance, consistent with the proposed Licensing Work Plan, unless fully justified by essential technical revisions to the LWP or other exceptional circumstances as concurred with by the Monitoring Committee of the Commission.
>
> CONDITION No. 2—The establishment of a clear commitment by the North Carolina Interagency Review Committee that the Division of Radiation Protection (DRP) and other state agencies will devote resources as necessary to support state performance consistent with the LWP schedule, including the resolution of state restrictions on and selection of appropriate tracers for proposed field activities.

[page 3] CONDITION No. 3—Agreement by the Authority to develop and maintain an expanded level of detail in the LWP project schedule at least one quarter in advance of the schedule.

CONDITION No. 4—Approval by the Monitoring Committee of the Commission of, and commitment from the Authority to adhere to, reasonable LWP periodic reporting requirements which include, but are not limited to, actual quarterly expenditures as measured against the original LWP; an explanation of all schedule slippage or cost overruns; quarterly cost projections and an update of the LWP schedule; the timely reporting of the results of topical meetings and decision point meetings; and, prompt notification to the Commission by the Authority upon discovery by the Authority, its contractors or sub-contractors of any condition that may disqualify the site for its intended use. The continuation of funding will be contingent an the absence of conditions disqualifying the Wake County site for its intended use.

CONDITION No 5—Establishment of a process by the Authority and/or the North Carolina Interagency Review Committee, as concurred in by the Commission's ~~Policy and Planning~~ Monitoring Committee *, that ensures continued DRP and Authority Senior Management level involvement in monitoring and maintaining consensus endorsement of the overall LWP and the prompt disclosure to the Commission of any new DRP concerns regarding the LWP.

FURTHERMORE, Commission Officers and Staff are hereby directed to work cooperatively with the Authority to establish updated site capacity requirements and waste stream characterization so that the Authority will characterize the site and seek a license in accordance

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* See approved change on page 5

with established Compact capacity requirements for the probable period of North Carolina site operation. This task is to be completed as soon as possible, but in any event, no later than the completion of Decision Point No. 2 in the LWP.

AND FURTHERMORE, the Commission recognizes that there are inadequate unreserved funds currently in the Commission's Treasury to meet projected needs to obtain a license for the existing site, for any potential litigation costs, and for costs related to construction of the facility. Therefore, the Commission directs the Commission Policy and Planning Committee, Commission Officers, and staff to work with the Authority, generators, and other parties to develop realistic models of cost and schedules for placing a site into operation and to develop realistic strategic approaches and agreements for the necessary funding. All work associated with this task shall be successfully accomplished by the completion of Decision Point No. 2 of the LWP. Release of funds from the Commission to the Authority for work beyond Decision Point No. 2 in the LWP shall be in accordance with the above specified agreements for funding.

[page 4]

The motion was seconded.

Commissioner Michael Mobley queried John Mac Millan as to the amount of money needed to reactivate the team to work on the Licensing Work Plan. Mr. Mac Millan stated that an additional $500,000 would be necessary and a clear commitment from the Commission would be needed for future funding for the contractors to begin work.

Commissioner Hawkins asked Mr. Mac Millan if the $500,000 would cover expenses needed to address the five conditions laid out in Commissioner Setser's amendment to the motion. Mr. Mac Millan answered that it would.

A vote was taken on Mr. Setser's amendment to Peter Schmidt's main motion. The amendment passed.

A vote was then taken on Mr. Setser's amendment to the substitute motion offered by Commissioner Mobley at the 8/26/96 Commission meeting. The vote was defeated.

Commissioner Mobley then withdrew his substitute motion in favor of the amended main motion. The substitute motion was withdrawn by unanimous consent.

Commissioner Hawkins made a motion to amend the main motion by the addition of Condition 6 which would read:

> The Commission shall not dispense any monies for further development without approval from the North Carolina legislature

After discussions relative to the effect of Commissioner Hawkins' amendment, the motion was defeated in a roll call vote of 10 to 4.

Commissioner Miller made the following amendment as a new paragraph to the main motion:

> In the meantime, the Compact Commission should conduct an in-depth examination of the present and anticipated need for a second low-level disposal site in the Southeast. This feasibility study would include an analysis of volume of waste from the seven Southeast states, technology changes and developments that have occurred to date and anticipated availability of other disposal options. Also to be considered would be siting cost, availability of generator funds for the licensing process, site construction, maintenance, closure and perpetual care.

The amendment was seconded. After a brief recess of the Commission, a vote was taken and the amendment was defeated.

The amended main motion as offered by Commissioner Setser was then voted on and passed in a roll call vote of 12 to 2.

[page 5] *New Business*

Commissioner Michael Mobley made the following motion:

> In order to implement the previous motion, the Commission instructs staff to:
>
> (1) notify the N.C. Low-Level Radioactive Waste Management Authority that funds in an amount up to $500,000 will be made available for the Authority to provide an expanded level of detail in the Licensing Work Plan (LWP) and to re-deploy a project team for implementation of the LWP, such funds to be paid out upon receipt of documentation of actual expenditures,
>
> (2) organize a Special Meeting of the Monitoring Committee, to be held no later than October 20, 1996, for the purpose of developing a process to certify whether the five conditions in the previous motion have been met by the appropriate entities in North Carolina; and
>
> (3) organize a meeting of the Policy and Planning Committee, representatives of the Authority, Southeast waste generators and other appropriate parties to begin development of approaches and agreements for funding the LWP, litigation and construction in North Carolina.

The motion by Commissioner Mobley was seconded.

Commissioner Miller queried whether the funds would be disbursed on a reimbursement basis or advanced before work was done. Mr. Mac Millan explained that contractors submit invoices for work previously authorized and then the Authority submits invoice documentation to the Commission Staff for reimbursement. Mr. Mobley stated that the intent of the motion was to reimburse for work done.

Executive Director Kathryn Haynes then questioned the reference to the Policy and Planning Committee in Condition 5 in Mr. Setser's motion. She inquired as to whether Mr. Setser instead wanted the Monitoring Committee to be referenced.

Commissioner Hawkins then made a motion that the vote on Mr. Mobley's motion be postponed until Mr. Setser's motion be reconsidered. The motion was seconded and passed.

Commissioner Setser made a motion to reconsider his amendment to the main motion previously passed. The motion was seconded and passed.

Commissioner Setser then moved that in Condition No 5 of the main motion, the reference to the Policy and Planning Committee be replaced by Monitoring Committee and the Commission accept the roll call vote on the motion as previously taken. The motion was seconded and passed

A vote was then taken on the motion by Commissioner Mobley and it passed.

APPENDIX Q

MINUTES April 18, 1997

[page 4] * * * The Commission recognizes that there are insufficient funds currently in the Commission's treasury to meet projected needs to complete development of a low-level radioactive waste disposal facility in North Carolina through the construction phase. The Commission further recognizes that a Task Force for Facility Funding has been diligently working to develop an approach far obtaining the necessary funding but has not yet reached a conclusion. Therefore, we direct the Policy and Planning Committee, Commissioner officers and staff to continue to support the work of the Task Force for Facility Funding until a recommendation for funding is reached or the Task Force concludes that it cannot reach agreement on a recommendation.

The Commission requests that the Task Force for Facility Funding continue its work as expeditiously as possible and that it notify the Chairman immediately upon reaching a recommendation so that a meeting of the Commission can be called at his recommendation. In the event that an agreement on a recommendation cannot be reached, the Policy and Planning Committee shall make a recommendation to the Commission as to how to proceed. The motion passed.

Mr. Mobley commended all the members of the Task Force for their hard work and dedication.

Report of the Administrative Committee

Peter Schmidt presented the Operating Budget for FY 1997-98 and made a motion that it be adopted as presented. The motion passed.

Report of the Monitoring Committee

Ms. Debra Shults reported that the Monitoring Committee adopted a resolution affirming compliance on Decision Point 2. She made the following motion:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized, pursuant to affirmative recommendations from the Authority on Decision Points 1 and 2 that in the reasonable judgment of the Authority it makes sense to proceed with the project, subject to review by the Monitoring Committee if indicated. The Staff will report the Authority's recommendations to the Chairman of the Monitoring Committee, who will, if necessary, call a meeting of the Monitoring Committee to veto the further release of funds. At all times in the funding release process the Chairman of the Monitoring Committee will be informed of fund releases and may call a meeting of the committee at any time.

Because of the large representation of the public at this meeting, Chairman Hodes asked for a motion for waiver of the rule to allow for public comment before Commission discussion of the motion.

Chairman Hodes explained the intent of the motion to be for the Commission to allocate funds in addition to the $6 M that has already been allocated. The purpose of the additional funds which is $2.9 M would be to allow the contractor to proceed with contracting procedures after the contractor and the Commission are satisfied that Decision Points 1 and 2 have been fully met and [page 5] agreed to. The Monitoring Committee would be authorized to refuse to release funds. If they do not, the staff will be authorized to release funds in accordance with statements presented for payment. Dr. Hunter will be the individual to be advised of all fund

releases. He may call a meeting of the Monitoring Committee at any time. The Commission is delegating its authority to withhold funds to Dr. Hunter.

Commissioner Mobley made a motion to waive the rule to allow for 2-minute comments from the public on the motion.

Dr. Hunter made a substitute motion that two people representing the opposing view represented be allowed to talk for five minutes each. The motion was defeated.

Mr. Mobley's motion passed with a 2/3 roll call vote.

Public comment was received. (Comments are recorded on tape in Commission office.)

The Commissioners then debated the pending motion. Commissioner Miller expressed concern over the release of additional funds and the oversight of the release of funds by the Monitoring Committee.

Commissioner Hunter stated that he thought the Decision Points were to balance risk versus cost. They were intended to be points at which the Commission would decide whether to go forward. He stated that he would like to forego concurrent work and just get to the Decision Point 2 even if it costs more.

Commissioner Mobley stated that the Commission has wrestled with many of the issues surrounding the funding of the Licensing Work Plan. He stated that disposal is the best route to protect the public from the hazards of radiation. Mr. Mobley feels that continued funding needs to be provided. Mr. Mobley then offered the following amendment to the motion with the motion to read as follows:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized. Monitoring of

expenditures will be done by the Monitoring Committee pursuant to the October 3 motion of the Commission.

After further discussion, the motion was defeated.

Commissioner Schmidt then offered the following substitute motion:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized, pursuant to affirmative recommendations from the Authority on Decision Points 1 and 2 that in the reasonable judgment of the Authority it makes sense to proceed with the project, subject to review and approval by the Monitoring Committee. The Staff will report the Authority's recommendations to the Chairman of the [page 6] Monitoring Committee who will call a meeting of the Monitoring Committee to review compliance with the conditions stated in the October 3, 1996 motion of the Commission and to approve the further release of funds. At all times in the funding release process, the Chairman of the Monitoring Committee will be informed of fund releases and may call a meeting of the committee at any time.

The substitute motion passed in a roll call vote.

New Business

There was no new business.

Public Comment

Several attendees provided comments (Recording on tape available in Commission office.)

The meeting was adjourned at 12:36 p.m.

Approved:

/s/ William H. Briner
Secretary-Treasurer

Attachments: Executive Director's Report
Treasurers Report

APPENDIX R

MINUTES

* * * regulator will assume the foundation of the LWP has eroded and will move back to a more traditional regulatory approach.

Commissioner Hunter asked Mr. Whisnant who the parties were that had concerns and if they considered it imprudent to continue with the project. Mr. Whisnant stated that Dr. Burt with the Division of Radiation Protection had expressed concern about the prudence of continuing with the project. Someone in the Attorney General's office had expressed concerns about the process and its implications and prudence. Another member on the IAC who is a representative of the Division of Radiation Protection also raised concerns about the prudence of proceeding with the Wake site

Old Business

Report of the Task Force for Facility Funding

Commissioner Mike Mobley, chairman of the Task Force for Facility Funding, recognized those who had participated on the Task Force and expressed his appreciation for their work. He presented a written report from the Task Force (copies available in the Commission office).

Report of the Monitoring Committee

Commissioner Hunter, chairman of the Monitoring Committee, reported that the Monitoring Committee met on June 27, 1997 and accepted the decision by the North Carolina Authority that Decision Point #2 had been met. Dr. Hunter called the Commission's attention to the letter received on July 21, 1997 from Mr. Richard Whisnant, chairman of the Interagency Committee on Low-Level Radioactive Waste, and expressed a personal dilemma of

releasing further funding to North Carolina. It appears there is no consensus on the implementation of the Licensing Work Plan.

Mr. Hunter then made a motion that Condition #5 be deleted from the October 3, 1996 motion. The motion was seconded.

Debate on the motion and the Intent of Condition #5 followed. Commissioner Mobley offered a substitute motion that Condition #5 read as follows:

> CONDITION No. 5—Establishment of a process by the Authority and/or the North Carolina Interagency Review Committee, as concurred in by the Commission's Monitoring Committee, that ensures continued DRP and Authority Senior Management level involvement in monitoring and maintaining consensus support of the overall LWP and the prompt disclosure to the Commission of any new DRP concerns regarding the LWP.

The substitute motion was voted upon and passed.

Public Comment

Several attendees provided comments. (Recording on tape available in Commission office.)

Report of the Task Force for Facility Funding (cont.)

Commissioner Mobley, chairman of the Task Force, continued his report by submitting the following motion:

The Task Force for Facility Funding requests that the Commission formally adopt the Report of Task Force for Facility Funding. The Commission further directs the Executive Director to formally transmit the report to the North Carolina Authority with a request to implement recommendations #2, #4 and #5 of the report.

The motion passed unanimously.

New Business

Vice-Chairman Jim Setser made a motion that the Commission approve the Authority's request for additional funding for the months of August and September for a total of up to $1.4 million. Further funding beyond the $1.4 million being considered will be predicated upon Mr. Whisnant providing the Commission with a successful progress report.

The motion was seconded. After discussion, the motion passed in a roll call vote of 9-2.

The next meeting of the Commission will be held in Orange Beach, Alabama on August 20-21, 1997.

The meeting was adjourned at 12:54 p.m.

Approved:

/s/ William H. Briner
Capt. William H. Briner
Secretary-Treasurer

APPENDIX S

MINUTES August 21, 1997

[page 4] * * * Mr. Mobley also reported that the Memorandum of Understanding as presented by the Southeast Generators' Group was an outgrowth of the recommendations for funding made by the Task Force for Facility Funding. Mr. Mobley highlighted the presentation as made by Mr Ken McCracken at the Policy and Planning Committee meeting. After much discussion, Mr. Mobley made the following motions:

Motion #1

Be it resolved that the Southeast Compact Commission:

- Agrees in principle with the Memorandum of Understanding (8/13/97 Draft) drafted by the Southeast Compact Electric Utilities Generators Group;
- Hereby authorizes the Chairman of the Commission to communicate the Southeast Compact Commission's support to Governor Hunt and the North Carolina Low-Level Radioactive Waste Management Authority (Authority) and to urge them to favorably consider the Memorandum of Understanding;
- Authorizes the use of funds currently being provided by the Commission to the Authority to include appropriate legal expenses and other costs that may be incurred in negotiating and developing a finalized Memorandum of Understanding; and
- Authorizes expenditure of current Southeast Compact Commission funds to support the negotiation and documentation of licensing loans and a construction funding letter of intent.

Public Comment

Public comment was entertained before vote on the motion offered by Mr. Mobley. Mr. Jim Warren, chairman of NC WARN, expressed his opinion that the site was still a gamble. He stated that the Memorandum of Understanding was burdensome for North Carolina He feels that the utilities are dangling free money in an effort to trap North Carolina legally and financially. He also stated that he did not believe the Governor would approve of the MOU.

Ms. Mary MacDowell stated that the Win-Win-Win-Win statement expressed in the Memorandum of Understanding does not include Chatham County.

A vote was taken on Motion #1 and it passed 11-2 with both North Carolina Commissioners voting against it.

Motion #2

The Southeast Compact Commission requests that the North Carolina Low-Level Radioactive Waste Management Authority (Authority) consider the proposed Memorandum of Understanding as a mechanism to address the license funding shortfalls and construction funding. It is the belief of the Southeast Compact Commission that the proposed Memorandum of Understanding addresses the previously identified significant issues in a balanced effective manner.

Further, believing that time is of the essence, a response regarding the Authority's intent with regard to the proposal is requested by December 1, 1997. An expression of agreement in principle to the final [Page 5] Memorandum of Understanding or an alternative proposal with appropriate concurrences is the Southeast Compact Commission's expectation.

The vote on Motion #2 passed 11-2 with both North Carolina Commissioners voting against it.

Motion #3

The Southeast Compact Commission authorizes the expenditure of up to $10,000.00 from the Commission's budget funds to obtain legal opinions regarding the Memorandum of Understanding and specifically regarding the export restriction issue.

The motion passed unanimously.

Report of the Monitoring Committee

Richard Hunter, Chairman of the Monitoring Committee, stated that there may be a need for stop gap funding for October and November for the Authority and made the following motion:

The Monitoring Committee recommends that the Southeast Compact Commission provide interim additional stop gap funding to the North Carolina Low-Level Radioactive Waste Management Authority through November 30, 1997 up to $1.2 million.

The motion passed unanimously.

The meeting was adjourned at 1:55 p.m.

Approved:

/s/ William H Briner
Secretary-Treasurer

Attachments: Executive Director's Report
Treasurer's Report

APPENDIX T

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

August 28, 1997 HAND DELIVERED

The Honorable James B. Hunt, Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27603-8001

Dear Governor Hunt:

In a series of letters to one another last year, we discussed the fact that sufficient Commission funds were not available to complete development of a low-level radioactive waste disposal site and that a plan was needed to secure the necessary funding. While there was not complete agreement on funding responsibilities, it was agreed that additional funding was needed.

Lacking resolution of the funding issue, the Commission organized a Task Force for Facility Funding to study the problem and recommend mechanisms for future funding. The Task Force was formed as an independent body with volunteer representatives of the North Carolina Low-Level Radioactive Waste Management Authority (Authority), the Commission, waste generators and the public. Enclosed are the recommendations of the Task Force issued in May and approved by the Commission in July.

Stemming from the recommendations of the Task Force, staff of the Authority and a group of regional waste generators began discussion of an approach in which regional generators could provide financial assistance to North Carolina to complete site development and ensure long-term financial viability of the site. Enclosed is the latest draft Memorandum

of Understanding (MOU) drafted by the Southeast Compact Electric Utilities Generators Group (SEGG).

Key elements of the proposal are as follows:

Participating generators will loan funds to the Authority to cover the anticipated shortfall for implementing the Licensing Work Plan (LWP), approximately $7 million, with provisions to cancel and forgive the debt if the Wake County site is not licensable due to a demonstrable site deficiency. If the site is licensable, the loans would be repaid when revenue bonds are issued to finance construction of the facility. The loan will not be indebtedness of the State or any of its political subdivisions and will require the Governor's approval after receiving the advice of the Advisory Budget Commission.

To facilitate issuance of revenue bonds, participating generators will guarantee that funding will be provided to North Carolina annually for any shortfall of facility operating revenues to meet the annual revenues necessary for operation of the facility, retirement of its debts and funding of its long-term care and closure funds.

To ensure that closure and long-term care funds are available in the event of an unanticipated and unavoidable premature closure of the facility, participating generators will agree to pay North Carolina their share (based on disposed volume) of any closure and long-term care fund shortfalls.

Reasonable conditions, including participation by both Duke Energy and Carolina Power and Light, will have to exist prior to the participating generators assuming their obligations, [page 2] and certain conditions (such as excessive taxes or fees) will release them of those responsibilities. Voluntary participation in the MOU will

be open to all Southeast Compact generators on equitable terms.

The MOU proposes that the Southeast Compact Commission make available the funds that it has designated for site licensing prior to generator loans being used for LWP funding. It also requires the Commission to implement an export policy which would allow access to out-of-region disposal facilities at all times for generators voluntarily participating in the MOU and, following annual disposal of a predefined amount of waste at the North Carolina Facility, for all other generators.

The MOU contemplates that the Authority would contractually commit to four items: (i) repayment of LWP loans plus interest equal to the generators' weighted average cost of capital from the funds raised when construction revenue bonds are issued following licensing of the facility; (ii) implementation of defined facility rate structures (which differentiate between generators participating in the MOU and generators not participating); (iii) implementation of defined escrow fund accumulation and distribution plans to ensure full funding of the closure and long-term care funds by the end of facility operation, payment of North Carolina capitalized expense plus interest upon completion of the State's term as host state, and payment of construction bond principle and interest; and (iv) reasonable audit rights for Participating Generators.

The Commission is continuing to provide funds for site development to the Authority through November 30, 1997. However, as we have discussed, it will be imprudent to continue to deplete Commission resources for this purpose if a source of funds is not established soon for the ultimate

completion of the project. If North Carolina does not have a long-term funding mechanism under consideration by December 1, we will not be able to continue funding.

The Commission heard a presentation of the draft MOU on August 20. On August 21, the Commission agreed in principle with the MOU and asked me to urge you and the Authority to consider the MOU as a mechanism to address the license funding shortfalls and construction funding. In order that we may proceed, please notify me by October 1, 1997 whether you agree in principle with the proposal offered by the SEGG.

The Commission is encouraged by the collaborative effort of the Authority, generators, the public and others and is hopeful an agreement can be reached to benefit all patties. I look forward to your response.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
Walter Sturgeon
Richard Whisnant
Southeast Compact Electric Utilities Generators Group

Enclosures: Report of the Task Force for Facility Funding
Memorandum of Understanding
Overheads and Summary, SEGG Report to the Policy and Planning Committee

APPENDIX U

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

November 3, 1997

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission
for Low-Level Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

As I promised in my letter of September 16, 1997, I have given further attention to the Compact Commission's efforts to develop additional funding for the proposed low level radioactive waste disposal facility in North Carolina during the few weeks since my return from the trade mission to Europe and Asia. To reiterate my earlier correspondence, I appreciate the Commission's efforts to develop a funding solution. I understand that the Compact Commission still endorses a proposal made by a group of several southeastern utilities (not including North Carolina utilities) to loan up to seven million dollars to a North Carolina State agency in exchange for, among other things, preferential rates and the ability to export waste out of the compact region.

At the outset, it must be recognized that this proposal involves authority vested by statute in multiple State agencies (not all of which are in my cabinet), local units of government, and the North Carolina legislature. Since the Compact Commission endorsed this proposal in August, it has been reviewed by several of these agencies in North Carolina that have direct involvement, including, among

others, the staff of the Local Government Commission in the office of our State Treasurer (essential due to the proposed bond issue to pay for construction of the facility); the Interagency Committee on Low-Level Waste (essential as a forum for concerns relating to facility regulation and operation); the Low-Level Radioactive Waste Authority (an independent State agency who is called on to sign the agreement); the Department of Environment and Natural Resources (responsible for licensing and regulating the facility) and the Attorney General's office. My staff has discussed the matter with representatives of each of these agencies, because the proposal calls for matters (such as issuing bonds, limiting the State's ability to assess taxes, and limiting the way a facility is operated) that are outside the jurisdiction of the Governor's office.

Based on my initial review, I find it doubtful that the practical, as well as legal, commitments envisioned would be approved by all the affected agencies and governmental [page 2] bodies. I do not believe they or I can square the Compact Commission's statutory goal of "distribut[ing] the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states," Compact Art. I, with a proposal that, among other things, requires:

- a North Carolina State agency to take on seven million dollars in debt with no budgeted or other means of repayment;
- North Carolina to bear the brunt of any shortfall in funding, given that this State has already paid over $30 million towards the facility, while every other Compact State has paid around $25,000; and
- North Carolina to limit the pricing and revenue stream from this future facility, at great risk to its ability to support bond financing, without the matter even being reviewed by the North Carolina legislature.

Furthermore, they will wonder, as I do, why the Compact Commission and generators have insisted that North Carolina commit to these steps in a timeframe that comes just before the entire schedule and budget for the facility is to be reevaluated. This timeframe is even less appropriate given the events that have recently come to light in the region and the nation that suggest the emergence of a fundamentally different market for low level radioactive waste.

At the conclusion of Decision Point 1, I understand the contractor for the authority is to reevaluate the schedule and budget for this facility. At that point, if there does, indeed, appear to be a shortfall in projected licensing revenue, the simplest, most equitable approach would be for each party state that has not already contributed beyond its pro-rata share to make a pro-rata payment to cover the shortfall. I am sure that the Compact Commission can come up with some such approach that provides the relatively few dollars needed to complete licensing without jeopardizing the future operation and financing of the facility.

My warmest personal regards.

Sincerely,

/s/ James B. Hunt
James B. Hunt jr.

JBH.rbw

cc: Hon. George W. Miller
Capt. William Briner
Warren Corgan
Walter Sturgeon
Robert High
Andrew A. Yanore, Jr.

APPENDIX V

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

HAND DELIVERED

November 14, 1997

The Honorable James B Hunt, Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27603-8001

Dear Governor Hunt:

Thank you for your letter of November 3, 1997 in which you state your thoughts, based upon your initial review, with regard to future funding of the proposed low-level radioactive waste facility. It is helpful to learn your thoughts at this stage in the process. There seem to be fundamental areas of misunderstanding leading to disagreement which need to be clarified and worked out.

You are correct in stating that the Commission continues to support the Memorandum of Understanding (MOU) as proposed. We believe it to be an equitable and thorough approach for providing the necessary funding mechanisms, providing necessary assurances, and balancing the risks among the parties involved. Under this proposal all parties would win—a facility would be opened to satisfy the needs of the compact and the generators, and the state would have a guaranteed revenue stream to recover its costs. The MOU acknowledges existing statutes and jurisdictions and does not ask the State to contractually commit to actions (such as limiting the State's ability to assess taxes) contrary to those statutes. The agreement does not place absolute constraints on the State. It specifies certain conditions under which the

participating generators would be released from their commitments but does not seek to contractually bind the State to preventing those conditions.

Based on the wording of your letter, you appear to have received interpretations of the MOU that are contrary to its intent in several key areas. For example, it is difficult for us to comprehend how a proposal with a guaranteed revenue stream can be seen as limiting " . . . the revenue stream from this future facility, at great risk to its ability to support bond financing." To the contrary, the proposal offers to reduce the financial risk to North Carolina and to enhance the State's ability to market revenue bonds for construction of the facility by guaranteeing an annual revenue stream sufficient for North Carolina to repay all bond debt, recover its investment, cover all facility operating costs, and fund reasonable fees. The guaranteed revenue stream is estimated to be $40 million per year for twenty years. We encourage you to study the proposal before drawing a final conclusion and will be pleased to discuss or negotiate the proposal or an alternative proposal.

Whether the response we receive from the North Carolina Low-Level Radioactive Waste Management Authority (Authority) embraces the MOU as proposed, a modification of the MOU, or an alternative plan such as the one you proposed in the letter, the response will need to encompass several elements not indicated in your letter.

First, the proposal must address funding for all future phases of site development. In addition to the funds needed for licensing, funding must be addressed for litigation and for construction. As North Carolina's representative on the Task Force for Facility Funding repeatedly pointed out, it will be difficult to obtain approval for revenue bonds for construction without a guaranteed revenue stream or customer disposal volume.

[page 2] Secondly, the proposal from the Authority must include evidence of concurrence from all parties to the proposal. If modifications to the MOU are proposed, then concurrence would be required from the Southeastern Compact Utility Generators Group (SEGG) and any other parties to the proposed agreement. If funding from other states is proposed, then agreement in principle from the other states will need to be presented. If the Commission will be expected to provide further funding for the project or otherwise be a party to the proposed funding plan, we need to be consulted in the negotiation of the proposal before it is presented by the Authority.

You have questioned the appropriateness of committing to a funding plan before the schedule and budget are once again reevaluated The Commission clearly has asked for no firm commitment at this time, but merely an agreement in principle to a *non-binding* MOU, intended to facilitate good faith development of a binding agreement before the existing Commission funds are exhausted. To delay agreement to a non-binding MOU in anticipation of a schedule and cost revision ignores the hard fact that Commission funds may be fully depleted in less than a year. Based on the fact that five months have already elapsed since the concepts in the MOU were first proposed to representatives of the Authority, seeking to assure that a year is available for completing a funding agreement does not seem excessive. By the time signatures to a binding agreement are required (on or before June 30, 1998), reevaluation of the budget and schedule will certainly be complete.

Further, you questioned the time frame, "given the events . . . that suggest the emergence of a fundamentally different market for low level radioactive waste." We have no knowledge of recent events which have changed the market for commercial low-level radioactive waste.

As for your concern with squaring the Commission's statutory goal of distributing the costs, etc. among the party states, I will restate the Commission's position that it is the intent of the compact law to accomplish this goal by obligating each party state, in turn, to develop and operate a facility. It has always been the intent of the law that each host state would be repaid for its expenses from facility revenues.

As stated in earlier correspondence, if agreement in principle cannot be reached among all appropriate parties by the December 1, 1997 deadline, the Commission will not provide funding for work done beyond November 30, 1997. The Commission remains hopeful that we may reach a meaningful agreement for future funding with the Authority by that date.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Warren G. Corgan
Commissioners and Alternate Commissioners
Southeastern Compact Utility Generators Group

APPENDIX W

[SEAL]

North Carolina
Low-Level Radioactive Waste
Management Authority

[Names Omitted in Printing]

James B. Hunt, Jr., Governor
Walter B. Sturgeon, Jr.,
Executive Director

December 19, 1997

VIA FACSIMILE & FIRST CLASS MAIL

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission for
Low-Level Radioactive Waste
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

I was disappointed to receive your letter of December 1 which responded to the Authority's November 25 motion and corresponding letter by stopping project funding. It is North Carolina's view that the Compact Commission and the other member states have failed to honor their commitments under the compact law and made further performance by the Authority impossible.

As you know, the Authority successfully completed Decision Points 1 and 2 of the Work Plan and technical activity was moving along at a very good pace. The Authority's priority has been to focus its resources and attention on obtaining an operating license, but it is committed to attempt to resolve construction funding and other issues in the proposed Memorandum of Understanding. It is clear to us, however, that a mutually agreeable funding arrangement will

take a lot of time and more flexibility to resolve. The financial consultant which we have retained has reinforced that view. We are committed to attempting to resolve unsettled issues, including future funding, given sufficient time. Insisting that we resolve these issues by 12/1/97 was unreasonable, as I told the Compact Commission at its November meeting.

All of our current relationships and responsibilities are between the Authority, the Compact Commission, and its member states. While the Compact Commission has asked the Authority to agree in principle with the MOU or find an alternative (both Governor Hunt and I have already proposed alternatives which were rejected), we would expect the Compact Commission to be working [page 2] hard to develop alternatives as well.

The inability of the generators' group to provide additional funds in the form of a grant rather than the proposed loan was also very disappointing to us. These monies would not have been needed until 1999, when the project would have been much further along and would have been provided on the same basis that North Carolina now provides funds. Although I fully understand the generators' concern about the money which has been spent, their reluctance to rally to this need conveys a lack of commitment and sense of urgency toward the project. We would have expected the generators' group, the Compact Commission, and all other member states to be very strong allies of what we were trying to do on their behalf.

In summary, the Authority finds itself in the following position:

1. The Compact Commission has cut off project funds even though the Authority has met its project targets and is making good technical progress. Funding cessation was based upon the Authority's failure to

obtain alternative funding agreements or to agree on the MOU by 12/1/97, a date which was unrealistic as the Authority told the SECC on numerous occasions and specifically at its November 1997 meeting in Norfolk. The Compact has cut off funding despite the fact that it currently has enough unreserved money available to proceed with the Licensing Work Plan beyond what the Authority believes is the key decision point, where success or failure will be much more predictable.

2. The generators' group has refused to commit to provide additional project funding as a grant, even though that funding will not be needed until mid-1999, at which time development will be much further along and the generators would retain the right to decide not to fund at that time.

3. Present Compact law makes it virtually impossible to issue revenue bonds. For that reason the Authority agrees that a contract between it and the generators is required in order to get construction funding. The current MOU, however, contains requirements which would also make it impossible to issue revenue bonds. While the Authority feels that it might be possible to develop an agreement which permits North Carolina to issue bonds and satisfies the needs of the generators, developing such an agreement will take time and could [page 3] not have been done by 12/1197.

In view of all the above, the Authority voted at its December 19 meeting that it has no alternative but to commence the orderly shutdown of the project pending the compact's reversal of its funding position or receipt of other instructions from the North Carolina Legislature.

It is extremely unfortunate that the Compact's actions have caused the project to be stopped. We have worked hard and made very good strides toward resolving the technical issues which plagued us in prior years. The Authority has no real choice but to commence a project shutdown given the generators' lack of commitment and the Compact's unwillingness to spend its existing funds.

Sincerely,

/s/ Warren G. Corgan
Warren G. Corgan, Chairman

cc: Walter B. Sturgeon
Richard B. Whisnant
Andrew A. Vanore, Jr.
Representative W. W. "Dub" Dickson
Southeast Compact Member State Governors

AUTHORITY MEETING—DECEMBER 19, 1997

The following motion was made by Authority Member Nick Long, seconded by Douglas Story, and unanimously passed:

In response to the Southeast Compact Commission's letter of December 1, 1997, and

Because of the Compact's cut-off of project funding for purely non-technical reasons and despite the Authority's successful accomplishment of Decision Points 1 & 2, and

Because of the Compact's insistence that the Authority agree in principle to the terms of the proposed "Memorandum of U standing" (MOU) by the unreasonable deadline of December 1, 1997, despite the fact that the MOU seeks to impose unreasonable or unworkable requirements on the Authority or the State, and

Because of the Compact Commission and its member states' refusal to commit unconditionally to the North Carolina project, and

Because of the Compact's refusal to spend its unreserved funds on hand despite the fact that it would accomplish work on the Licensing Work Plan to or through Decision Point 5 and/or to seek alternative funding, including assessments by member states, and

Because of the fact that present compact law makes it virtually impossible to issue revenue bonds for the project because a party state may withdraw from the compact after construction financing is needed, and

Because of the fact that by its actions the Compact has failed to honor its obligations and duties to the Authority, the State of North Carolina, and other member states, and made further performance by the Authority nearly impossible,

I move that the Authority direct its contractors, consultants, and staff to begin the orderly shutdown of the project pending the Compact's reversal of its funding position or receipt of other instructions from the North Carolina Legislature,

and that the Authority authorize and direct its Chairman, in consultation with Staff and the Chairman of the Legal and Finance Committee, to so inform the Compact Commission.

FULL AUTHORITY MEETING—DECEMBER 19, 1997

The following motion was made by Authority Member Bob Heater, seconded by John Hairr, and unanimously passed;

Whereas, the Southeast Compact Commission (Compact) has cut off project funding for purely non-technical reasons and despite the North Carolina Low-Level Radioactive Waste Management Authority's (Authority) successful accomplishment of Decision Points 1 & 2, and

Whereas, the Authority has no other source of funding with which to continue the Licensing Work Plan activities, and;

Whereas, the State of North Carolina, including the Authority, cannot commit to the terms and conditions required by the Compact and the Southeast Generators' Group for the resumption of funding of Licensing Work Plan activities, and;

Whereas, the Authority has certain statutory obligations with respect to the work completed and in progress to date for the facility development, and;

Whereas, the Authority has limited funds with which to satisfy some or all of said obligations;

Be it hereby Resolved, that the Authority finds that it has no other alternative than to begin an orderly cessation of facility development activities, including commencing the restoration of the preferred site, so that the project work can be preserved until such time as the Authority can receive instruction from the North Carolina General Assembly with regard to continuing the Authority's statutory mission.

To accomplish the objective of this resolution, I move that the Authority direct its contractors and staff to do the following:

Complete the work authorized at the November 25, 1997 Authority meeting, which includes maintaining a basic project team through the month of December 1997 and completing final revisions to the documentation and reports for Decision Point I;

Commence and complete the orderly collection of all outstanding project records and the archiving of said records at the Morrisville office of Harding Lawson Associates so that the records may be easily retrievable in the event that the project is restarted;

Complete all of the above at a total cost for all contractors not to exceed $519,058, which includes the $189,058 already authorized;

Begin site restoration activities at a total cost for all contractors not to exceed $100,000, based upon a defined scope of work developed with the advice and consent of the Technical Committee; * * *

APPENDIX X

[Names Omitted In Printing]

(LOGO) Southeast Compact Commission
for Low-Level Radioactive Waste Management

April 26, 1999

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Southeast Compact Commission for Low-level Radioactive Waste Management held its meeting in Raleigh on April 20 and 21, as scheduled, to discuss efforts in North Carolina to fulfill the State's legal obligations to the region since the cessation of siting activities in December 1997. The Commission was disappointed that you were unable to attend.

At the meeting, the Commission heard a status report from the North Carolina Low-Level Radioactive Waste Management Authority, the agency charged by the North Carolina General Assembly with developing a disposal facility for the region's low-level radioactive waste. The North Carolina Low-level Radioactive Waste Management Authority reported no efforts to resume site development activities since December, 1997, when the Authority discontinued its efforts to site a disposal facility.

The Southeast Compact Commission has asked me to notify you that the State of North Carolina is obligated under Southeast Compact law to provide a low-level radioactive waste disposal facility for the region. The Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and

safety and economic well-being of the citizens of seven states, by failing to proceed with the process of providing for the disposal of the region's radioactive waste.

Further, the Commission respectfully requests that you provide the Commission with a written plan and schedule for North Carolina to return to a state of compliance with the compact law and ultimately to provide a disposal facility for the region. The motion adopted by the Commission is enclosed.

I realize that the General Assembly is still in session; however, a prompt response to this request is imperative. Should you have any questions, please contact me at (813) 289-6200, extension 3150, or Kathryn Haynes, the Executive Director of the Commission, at (919) 821-0500.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

Enclosure

cc: Southeast Compact Commission

Recommendation from a Joint Meeting of the Policy and Planning Committee and the Monitoring Committee 4/20/99

Adopted April 21, 1999

It is recommended that the Chairman of the Commission be directed to write a letter to the Governor of North Carolina and to the leadership of the North Carolina General Assembly, with copies to the North Carolina Low-Level Radioactive Waste Management Authority stating the following.

- that the State of North Carolina is obligated under Southeast Compact law to provide a low-level radioactive waste disposal facility for the region;
- that the Southeast Compact Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed with the process of providing for the disposal of the region's low-level radioactive waste; and
- that the Southeast Compact Commission requests the leadership of the North Carolina General Assembly to respond in writing with a plan and schedule for North Carolina to return to a state of compliance with the compact law and ultimately to provide a disposal facility for the region.

APPENDIX Y

SANCTIONS COMPLAINT

Complaint

By its actions to cease all activities in pursuit of a license to build the second regional low-level radioactive waste (LLRW) disposal facility for the Southeast Interstate Low-Level Radioactive Waste Compact (Compact), the State of North Carolina has failed to fulfill its obligations as a party state of the Compact and ... the second host state under the Southeast Interstate Low-Level Radioactive Waste Compact law (Compact Law) to provide a disposal facility for the Southeast region. North Carolina has not provided any promise or evidence of its intention to provide funding for the resumption of work on the project.

Furthermore, the North Carolina Low-Level Radioactive Waste Management Authority (Authority) has received a total of $79,930,337 (Attachment 1) from the Southeast Interstate Low-Level Radioactive Waste Compact Commission (Commission) for the purpose of developing a disposal facility, yet has not provided a facility for the region. North Carolina received the funds from the Commission with the full knowledge that it was expected to develop a facility for the Compact.

Authority for Complaint

The authority for this complaint is Article 7(F) of the Compact which empowers the Commission to impose sanctions against party states. Article 7(F) provides that any party state which fails to Comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including the suspension of its rights under this compact and revocation of its status as a party state."

The process for implementing Article 7(F) is set out in the "Administrative Sanctions Procedure" adopted by the Commission on April 5, 1990.

Supporting Statements

- North Carolina accepted the terms and conditions of the Compact when the North Carolina General Assembly enacted the language of the Compact into North Carolina General Statute 104F in 1983.

- North Carolina was designated as host state for the second regional disposal facility on September 11, 1986 by a two-thirds majority vote of the Commission This selection followed a lengthy screening and review process conducted by the Commission and outside consultants.

- The North Carolina General Assembly accepted the designation as the second host state in 1987 when it created the Authority by enacting North Carolina General Statute 104G. The Authority was given the responsibility for selecting and developing a site for a regional LLRW disposal facility and for providing for its operation, closure and post-closure control. The North Carolina General Assembly acknowledged its host state obligations when it repeatedly provided general state funds for the Authority, the Division of Radiation Protection and other state agencies involved in the license review process. The legislature also appropriated $16 million of general funds to the Authority for the initial site selection process.

- North Carolina has not provided any additional funding directly for the site selection process since October, 1989, when the Commission, acting on a recommendation from the Authority, voted to voluntarily provide funding for site development. Note that Article 4(K) of the Compact

Law states that "the Commission is not responsible for any costs associated with the creation . . . [or] the operation of any facility."

- The Commission collected fees from both regional and out-of-region generators using the first regional disposal facility in Barnwell, South Carolina to voluntarily provide funds to North Carolina for the site selection process. The attached financial reports and minutes (Attachment 2) show funds provided to the Authority to develop the facility and the mechanisms used to generate those funds.

- South Carolina withdrew from the Compact in 1995 in large part because of the lack of progress in the North Carolina siting process. Since then, the Commission has not had a source of funds from either the Barnwell, South Carolina facility or from the anticipated second disposal facility in North Carolina. The Commission has grown increasingly concerned over the shortfall of funds needed to develop the North Carolina facility and its ability to generate funds needed for the development of the next regional facility and future Commission operations. That concern was initially expressed in a letter to Governor Hunt dated January 5, 1996 (Attachment 3) informing him that the State will need to develop a plan for fulfilling its obligations to the Compact.

- The Commission has worked with the Authority, regional generators, and others to develop a comprehensive plan to provide funding for completion of the facility. The Commission notified North Carolina on August 28, 1997 (Attachment 4) that funding would not be provided for work done by the Authority beyond November 30, 1997 until the funding issue is resolved and that the Commission expects North Carolina to continue its siting activities.

- On December 19, 1997 the Authority voted to shut down the project pending receipt of instructions from the North Carolina General Assembly or additional funding from the Commission. The attached letter of December 19, 1997 from Mr. Warren Corgan, Chairman of the Authority, to Richard S. Hodes, Chairman of the Commission, includes the motions approved by the Authority (Attachment 5).

- The attached statement (Attachment 6) of Mr. Walter Sturgeon, Executive Director of the Authority, indicates the project was shut down in early 1998. Furthermore, as recently as April 21, 1999 the Authority has not resumed any activities to develop a disposal facility and has stated that it has no plans to do so unless the Commission provides funding.

Recommended Sanctions

It is recommended that the Commission impose the following sanctions against North Carolina for its failure to fulfill its obligations as a party state of the compact and as the second host state under the Compact Law to provide a disposal facility for the Southeast region:

- Require the return of the $79,930,337 plus interest for the funds voluntarily provided by the Commission to North Carolina and damages for loss of a source of funds for the Commission operating budget and development of future regional facilities.

- Recover $2500 per day from North Carolina for every day beyond August 1, 2001 that an acceptable disposal facility is not provided for use by Southeast regional generators.

Limit export for treatment, storage or disposal of waste from North Carolina generators at the Envirocare of Utah facility in Clive, Utah, the Chem-Nuclear Systems, Inc. facility in Barnwell, South Carolina, or any other facility which may accept LLRW from regional generators in the future until a regional facility in North Carolina is opened.

- Prohibit the use by North Carolina generators of processing facilities located in the Southeast Compact states until North Carolina opens a facility.

- Require North Carolina to store all waste from the region until a new regional facility is provided.

- Direct the Chairman and the Executive Director, working with outside counsel, to go directly to court for a declaratory judgment to require North Carolina to provide a facility or a court order for recovery of funds, interest, and damages.

Filed by the State of Florida this 21st day of June, 1999.

/s/ Richard G. Hunter
Richard G. Hunter,
Ph.D.
Commissioner,
State of Florida

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Commissioner,
State of Florida

Filed by the State of Tennessee this 21st day of June, 1999.

/s/ Michael Mobley
Michael Mobley
Commissioner,
State of Tennessee

/s/ Debra Shults
Debra Shults
Alt. Commissioner,
State of Tennessee

APPENDIX Z

(LOGO)

State of North Carolina
Department of Justice
P.O. Box 629
RALEIGH
27602-0629

MICHAEL F. EASLEY
ATTORNEY GENERAL

Phone: (919) 716-6400
Fax: (919) 716-6750

December 1, 1999

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission for Low-Level Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

This letter shall serve as North Carolina's response to letters from the Compact Commission to Governor James B. Hunt, Jr., Lieutenant Governor Dennis A. Wicker, President Pro Tempore of the Senate Marc Basnight, and Speaker of the House of Representatives James B. Black, providing formal notice of a sanctions hearing to be held on December 8, 1999, in Atlanta, Georgia. At that hearing we are told that the Compact Commission intends to hear evidence and consider proposed sanctions against North Carolina for an alleged failure to "fulfill its obligations as a party state of the Compact and as the second host state . . . to provide a disposal facility for the Southeast region."

North Carolina joined the Compact in 1983 as a result of the ratification of the Compact agreement by the North Carolina General Assembly. This legislation was enacted with the intent and understanding that the agreement required a cooperative effort by the party states to develop safe

facilities for the storage and disposal of low-level radioactive waste generated in the southeast region. This cooperative effort included the distribution of development costs on an equitable basis. As the designated second host state for a facility, North Carolina has incurred costs in excess of 50 million dollars in carrying out its responsibilities. From 1988 through 1997 the Compact Commission consistently provided supplemental funding for the development process as required by the Compact agreement.

In December, 1997, however, the Compact Commission terminated supplemental funding of the project, thereby shifting the total economic burden to the taxpayers of North Carolina. As a result of this breach of the Compact agreement, the North Carolina General Assembly concluded that North Carolina had no option but to exercise its right under Article VII(g) of the Compact law to withdraw from the Compact. Senate Bill 247 was enacted by the General Assembly on July 26, 1999, formalizing North Carolina's withdrawal from the Compact. The Compact Commission was informed of this action on that same date by Representative George W. Miller, Jr.

[page 2] In response to North Carolina's refusal to accept the entire economic burden of licensing and constructing a disposal facility the Compact Commission has now initiated a sanctions proceeding against North Carolina. Having withdrawn from the Compact, however, North Carolina is no longer legally subject to the terms of the Compact agreement or the jurisdiction of the Compact Commission. Furthermore, it is North Carolina's position that the Compact Commission has no authority under the Compact agreement to conduct a sanctions proceeding against a state that has voluntarily withdrawn from the Compact. For those reasons, and after careful consideration by all concerned, it has been decided that North Carolina will not participate in the sanctions proceeding and will vigorously oppose any effort by the

Commission to impose sanctions or retain further jurisdiction over this state.

Prior to termination of supplemental funding by the Compact, North Carolina, at great cost, consistently progressed toward a licensing decision as required by the Compact agreement, acting at all times in good faith, but without compromising the level of scientific and regulatory scrutiny required to protect the safety, health and welfare of the people of this state. North Carolina will continue to take all appropriate measures to provide for the storage and disposal of radioactive waste generated in North Carolina in accordance with federal and state laws and regulations.

Sincerely,

/s/ Michael F. Easley
Michael F. Easley

APPENDIX AA

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

BY CERTIFIED MAIL

November 8, 1999

The Honorable James B. Hunt Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27611

Dear Governor Hunt:

On June 21, 1999, the states of Florida and Tennessee filed a formal sanctions complaint with the Southeast Compact Commission in accordance with Article 7(F) of the Southeast Compact law. The complaint claims that the State of North Carolina is in violation of the compact law for failure to "fulfill its obligations as a party state of the Compact and as the second host state . . . to provide a disposal facility for the Southeast region." It further claims that the "North Carolina Low-Level Radioactive Waste Management Authority (Authority) has received a total of $79,930,337 from the Southeast Interstate Low-Level Radioactive Waste Compact Commission (Commission) for the purpose of developing a disposal facility, yet has not provided a facility for the region." The Commission reviewed the complaint and decided to hold a sanctions hearing in accordance with its Administrative Sanctions Procedure.

This letter serves as formal notice that a formal, quasi-judicial sanctions hearing will be held by the Commission at 8:30 a.m. on December 8 in Atlanta, Georgia to address the complaint against North Carolina. A meeting notice is enclosed.

The Commission will meet on December 9 to decide, based on the evidence presented at the hearing, whether North Carolina violated the compact law. If the Commission finds a violation, it will also vote on a sanction appropriate to the violation.

As a party to the sanctions hearing, North Carolina has the right to fully participate in the proceedings. The Commission's sanctions procedure and the hearing guidelines that describe the parties' rights and responsibilities during the hearing are enclosed. Please notify the Commission offices as to who will represent North Carolina in the proceedings.

It is the policy of the Commission to try to resolve all grievances before the initiation of formal proceedings. Settlement is encouraged during any stage of the sanctions procedure.

I would be pleased to answer any questions you may have with regard to the sanctions process.

Sincerely,

/s/ Kathryn V. Haynes
Kathryn V. Haynes
Executive Director

Enclosures

APPENDIX BB

RESOLUTION

Adopted 12/9/99

WHEREAS, the Southeast Compact Commission for Low-Level Radioactive Waste Management ("Commission") has determined that the State of North Carolina failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party state to this Compact; and

WHEREAS, according to Article VII(f) of the Compact law, North Carolina is subject to sanctions by the Commission.

NOW THEREFORE, pursuant to Article VII(f), the Commission resolves as follows:

The State of North Carolina shall pay to the Commission the sum of $79,930,337, the amount of funds provided by the Commission to North Carolina for the development of a regional low-level radioactive waste disposal facility, plus interest at the applicable legal rate from the date by which the North Carolina Low-Level Radioactive Waste Management Authority ceased activities to develop a regional disposal facility, January 1, 1998;

The State of North Carolina shall pay to the Commission the sum of $10 Million resulting from the loss of a source of funds for the Commission operating budget for a period of twenty years, the term of operation for a regional disposal facility;

The State of North Carolina shall pay to the Commission its attorney's fees incurred since the date of the sanctions complaint filed by the States of Florida and Tennessee, June 21, 1999, in connection with the

sanctions proceeding and any further enforcement actions resulting from North Carolina's violation of the Compact;

The sums provided above shall be paid in full by July 10, 2000; and

In the event of default, the Executive Director of the Commission is directed to work with outside counsel to take such enforcement actions, including litigation, as necessary to collect all unpaid sums.

For the purposes of and in accordance with Article VII(f) of the Southeast Compact, the rights and obligations incurred by the State of North Carolina as a party state to the Compact, including those incurred as a host state, shall remain in full force and effect until the terms of the sanction are complied with and satisfied in full, as determined by the Southeast Compact Commission in its sole discretion.

APPENDIX CC

ATTORNEY GENERAL MIKE EASLEY'S RESPONSE TO THE DECISION BY SOUTHEAST LOW-LEVEL RADIOACTIVE WASTE COMPACT COMMISSION TO IMPOSE SANCTIONS AGAINST NORTH CAROLINA

FOR IMMEDIATE RELEASE

CONTACT: Carl Hepp (919) 716-6413 or Amanda Crumley (919) 716-6412
December 9, 1999

Today, the Compact Commission voted unanimously to impose sanctions against North Carolina for withdrawing from the Compact. The sanctions include repayment of $80 million plus interest in funds advanced to North Carolina for the Compact project. In addition, they are seeking the recovery of $10 million in lost future revenue for the project and payment of all attorneys fees for the Compact to enforce the sanction. The deadline for payment of this money is July 10, 2000. North Carolina did not participate in the sanctions hearing.

"We clearly stated North Carolina's position regarding the sanctions hearing to the Compact Commission last week. The Compact has neither the means nor the authority to enforce these sanctions."

"We do not need to wait until next July to give the Compact Commission North Carolina's answer. The Answer is 'NO'."

"When the Compact breached its agreement with North Carolina and it became clear that the Compact did not share North Carolina's concerns for the safety of citizens or the environment, the legislature legally withdrew from

RECORD
AND
BRIEFS

No. 132, ORIGINAL

Supreme Court, U.S.
FILED
AUG - 5 2002
OFFICE OF THE CLERK

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

BRIEF IN OPPOSITION

ROY COOPER
North Carolina Attorney General

Grayson G. Kelley*, Senior Deputy Attorney General
John F. Maddrey, Special Deputy Attorney General
Jennie Wilhelm Mau, Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

August 5, 2002

*Counsel of Record

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I

THE MOTION FOR LEAVE TO FILE BILL OF COMPLAINT SHOULD BE DENIED

Plaintiffs' Motion seeks leave to file essentially the same Bill of Complaint that was denied by this Court on June 25, 2001 (Docket No. 131, Original). The relief sought is identical to that set forth in the previous action. The only substantive change in the Bill of Complaint is the repackaging of the action by the addition of four new named plaintiffs – the State of Alabama, the State of Florida, the State of Tennessee, and the Commonwealth of Virginia – to the original plaintiff, the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"). The plaintiffs' own pleadings, however, demonstrate that the four states have been added as nominal parties for the sole purpose of invoking the original jurisdiction of this Court to resolve a dispute between the Commission and the State of North Carolina.

In renewing its Motion for leave to file the Bill of Complaint, the Commission relies heavily upon a view expressed in the Brief for the United States as *Amicus Curiae* filed in the prior action suggesting that this Court would have exclusive original jurisdiction over an action brought by one or more of the States that are parties to the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") against another party State to enforce the Compact. Ironically, whereas the Commission went to great lengths to discredit and belittle the legal analysis and conclusions set forth in that brief (*See* Supplemental Brief in Response to the Brief of the Solicitor General, No. 131, Original, filed June 5, 2001),

the Commission's renewed Motion is explicitly premised upon Plaintiffs' acceptance of "the implicit invitation of the United States to file an original action against North Carolina pursuant to 28 U.S.C. §1251(a)." (Motion for Leave to File Bill of Complaint and Bill of Complaint (hereinafter "Motion") at 19)

Aside from the Commission's unusual assertion that it has received an "invitation" from the United States to refile an original action in this Court, its reliance on the Brief for the United States ignores the Solicitor General's expressed limiting condition that original jurisdiction may only be invoked by a party state "on the basis of a proper cause of action" in which a state "seek[s] an appropriate remedy." (Petitioners' Appendix (hereinafter "Pet. App.") at 14a, 21a) Nowhere does the Solicitor General suggest that the Commission's addition of four states as nominal plaintiffs converts the prior action into a proper cause of action appropriate for the exercise of this Court's original jurisdiction.

The factual predicate for the Commission's Motion has not changed. The Commission is the real party in interest, seeking monetary damages from the State of North Carolina in the same amount and under the same legal theories argued in its prior Motion. The Commission specifically asserted in the prior action that "only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it." (Supplemental Brief in Response to the Brief of the Solicitor General, No. 131, Original, at 6) The addition of four states as nominal plaintiffs does nothing to modify this posture, and should not be accepted

as a basis for reconsideration of the Court's prior rejection of the Commission's Motion.

STATEMENT OF THE CASE

Compact (enacted by North Carolina at N.C. GEN. STAT. § 104F-1 (repealed effective July 22, 1999) (App. at 5a-26a)), was enacted by each of the eight original member states and consented to by the United States Congress in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act[1] Pub. L. No. 99-240, Title II, 99 Stat. 1859 (1986). North Carolina joined the Compact as a party state pursuant to legislation enacted by the 1983 North Carolina General Assembly. It was the intent of the party states, as stated in the Compact agreement, to:

> enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort, provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, promote the health and safety of the region, limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region, encourage the reduction of the amounts of low-level waste

---

[1] The original party states were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. South Carolina withdrew from the compact in 1995. North Carolina withdrew in 1999.

> generated in the region, distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states, and ensure the ecological management of low-level radioactive wastes.

Compact, Article I (App. at 6a).

The Compact agreement also created Commission to carry out the general administrative functions of the Compact. Compact, Article IV (App. at 11a-18a). Each party state was allowed to appoint two voting members to the Commission. The costs of the Commission's operations were to be funded by an initial $25,000 payment made by each party state and through surcharges to be levied on generators disposing waste at the regional facility. The first designated regional facility was the waste facility already operating in Barnwell County, South Carolina. Compact, Article IV(h) (App. at 15a-16a); Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, § 2, art. 7(H), 103 Stat. 1289 (1989).

Under the express terms of the Compact, it was agreed that each party state retained all elements of its sovereignty and that nothing in the Compact would be construed to "infringe upon, limit or abridge those rights." Compact, Article III (App. at 9a). The party states further agreed that nothing in the Compact would serve to "[a]lter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions" or "[a]ffect the rights and powers of

any party state and its political subdivisions to regulate and license any facility within its borders." Compact, Article VI(a)(7) and (9) (App. at 20a). Moreover, each party state, including North Carolina, reserved an unconditional right to withdraw from the Compact at any time up until thirty days after commencement of operation of the second host state disposal facility. Compact, Article VII(h) (App. at 24a); Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, 103 Stat. 1289 (1989).

The Commission selected North Carolina as the second host state in September, 1986. In response to the selection, the North Carolina General Assembly enacted legislation creating the Low-Level Radioactive Waste Management Authority (the "Authority") for the purpose of fulfilling its responsibilities under federal law and the Compact, while protecting public health, safety and the environment. N.C. GEN. STAT. § 104G (repealed effective July 1, 2000). The Authority initiated the complex, expensive and lengthy process of engaging consultants and contractors necessary to move forward with site selection, licensing and construction of a disposal facility.

In December, 1993, the Authority's primary contractor, Chem-Nuclear Systems, Inc. ("Chem-Nuclear"), submitted a license application for a site in Wake County, North Carolina to the State's licensing authority, the Division of Radiation Protection in the Department of Environment, Health, and Natural Resources (the "Department"). The Department is the designated state agency responsible for administration of

North Carolina's radiation protection program, with specific responsibility for the process of licensing low-level radioactive waste facilities. N.C. GEN. STAT. § 104E (1999). After extensive review by the Department, significant deficiencies were found in Chem-Nuclear's original application. Additionally, numerous technical concerns related to health and safety were revealed which required resolution prior to licensing the proposed Wake County site.

The issue of funding responsibility for host state disposal facilities is not specifically addressed by the Compact. Although Article IV(h) of the Compact provides for funding of the Commission's operations, there are no direct references to financial responsibility for the initial costs necessary for site identification, licensing and construction of a regional facility. Article I, however, does declare it to be Compact policy to "distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states."

In February, 1988 the Commission, in recognition of this policy, agreed that it would be "appropriate and necessary" to provide funding for "any state" developing the second disposal facility and thus authorized the use of the Commission's "State Assistance Trust Fund" "for the initial planning and administrative costs and other pre-operational costs associated with [North Carolina's] obligation to create and operate a regional facility." *See* Feb. 9, 1988 Resolution (Pet. App. at 34a). The monies in the "State Assistance Trust Fund" were part of the Commission's operating budget financed through

surcharges paid by generators utilizing the Barnwell disposal site.

In 1989, the Commission unanimously voted to levy an additional "Capacity Assurance Charge" on generators disposing waste at Barnwell. Under this system, payments made by generators were collected by Chem-Nuclear, which also operated the Barnwell facility, and forwarded to the Commission "[t]o assure the timely development of the second regional disposal facility in North Carolina." *See* Oct. 24, 1989 Minutes, Southeast Compact Commission (Pet. App. at 36a-47a, 39a). The Commission's policy of collecting surcharges and fees from generators to fund the development of the second disposal facility continued until South Carolina withdrew from the Compact in 1995. *See* Nov. 15, 1990 Minutes, Southeast Compact Commission (Pet. App. at 48a-59a); Sept. 28, 1992 Minutes, Southeast Compact Commission (Pet. App. at 60a-65a); Nov. 13, 1992 Minutes, Southeast Compact Commission (Pet. App. at 66a-67a).

North Carolina relied on the Commission's assurance of supplemental funding in moving forward with the site selection and licensing process. The State, however, in a good faith effort to fulfill its responsibilities under federal law and the Compact, also contributed substantial state funds and resources in furtherance of the project, in excess of $50 million. Generator fees were the source of all Commission funds provided to North Carolina for use in the facility licensing process, the other party states having made no financial

contribution to the Compact beyond their initial $25,000 payment.

In July, 1995, South Carolina withdrew from the Compact and closed Barnwell as a regional facility, purportedly due to North Carolina's inability to develop a second disposal facility within the original projected schedule. This withdrawal and immediate closure was a clear violation of the terms of the Compact agreement requiring that the Barnwell facility remain open for four years after notification of withdrawal. Compact, Article VII(g) (App. at 24a). The Commission, however, took no action (either in the form of sanctions or a legal proceeding) against South Carolina. Nor did the Commission act to ensure that the Barnwell disposal facility would remain available to all of the region's generators for the required four years. South Carolina subsequently re-opened the Barnwell facility to generators from all states other than North Carolina.[2]

As a result of South Carolina's withdrawal from the Compact, the Commission lost the Barnwell disposal facility as a source of funding. Rather than initiating action against South Carolina, however, the Commission's reaction was to terminate funding to North Carolina. On January 5, 1996, the Commission Chairman notified North Carolina that future funds would not be available for development of the second

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[2] Effective July 1, 2000, South Carolina joined the Atlantic Interstate Low-Level Radioactive Waste Compact and repealed the ban on low-level radioactive waste shipments to the Barnwell disposal facility from generators located in North Carolina.

regional disposal facility. *See* Jan. 5, 1996 Letter from Richard S. Hodes to Governor James B. Hunt (Pet. App. at 70a-74a).

In response, Governor Hunt advised the Commission that the Compact agreement contemplated an equitable distribution of costs and reminded Dr. Hodes that North Carolina had at that time already contributed $30 million of state funds for the facility, while none of the other party states had directly provided any money beyond their original $25,000 contribution. Governor Hunt advised the Chairman that under such circumstances he would not recommend that the General Assembly "assume a greater portion [of] the financial responsibility for the project than it [had] done to date." *See* Apr. 8, 1996 Letter from Governor James B. Hunt to Richard S. Hodes (App. at 27a-30a, 30a) and Jun. 14, 1996 Letter from Governor James B. Hunt to Richard S. Hodes (Pet. App. at 80a-81a).

Despite the Commission's notification that funding would be terminated, sporadic funds were released, thereby allowing North Carolina to continue its progression toward a licensing decision. *See* Oct. 3, 1996 Minutes, Southeast Compact Commission (Pet. App. at 88a-94a); Apr. 18, 1997 Minutes, Southeast Compact Commission (Pet. App. at 95a-99a); Aug. 21, 1997 Minutes, Southeast Compact Commission (Pet. App. at 103a-105a). In December, 1997, however, the Commission did terminate all supplemental funding of the project, thereby shifting the total economic burden for the facility to the taxpayers of North Carolina. *See* Dec. 1, 1997 Letter from Richard S. Hodes to Low-Level Radioactive Waste

Management Authority Chairman Warren G. Corgan (App. at 31a-32a). In response to the Commission's decision, North Carolina had no option but to discontinue site development activities. *See* Dec. 19, 1997 Letter from Warren G. Corgan to Richard S. Hodes (Pet. App. at 117a-120a).

In June, 1999 two party states, Tennessee and Florida, filed a complaint with the Commission under Article VII(f) of the Compact, seeking sanctions against North Carolina for cessation of facility development activities. Article VII(f) subjects any "party state" to potential sanctions for violation of the Compact terms.

On July 26, 1999 the North Carolina General Assembly enacted legislation repealing the Compact law and withdrawing North Carolina from the Compact. 1999 N.C. Sess. Laws 357 (App. at 1a-3a). This action was in accordance with the right of withdrawal reserved by each state pursuant to Article VII(g) of the Compact. The Commission was advised of North Carolina's withdrawal on the date the legislation was enacted.

On August 18, 1999, the Commission voted to initiate a formal sanctions hearing procedure against North Carolina. In November, 1999 the Commission notified North Carolina that a sanctions hearing would be held on December 8, 1999, with a decision regarding sanctions to be made on December 9, 1999. *See* Nov. 8, 1999 Letter from Kathryn V. Haynes, Executive Director, Southeast Compact Commission, to Governor James B. Hunt, Jr. (Pet. App. at 135a-36a). In response to this notification, the North Carolina Attorney

General sent a letter to the Chairman of the Commission advising him that the Commission had no jurisdiction over North Carolina subsequent to the State's withdrawal from the Compact. *See* Dec. 1, 1999 Letter from Attorney General Michael F. Easley to Richard S. Hodes (Pet. App. at 132a-34a).

Disregarding North Carolina's withdrawal from the Compact, the Commission held a hearing on December 8, 1999, and on December 9, 1999 voted to impose sanctions. *See* Compact Resolution adopted Dec. 9, 1999 (Pet. App. at 137a-38a). The Commission's resolution demanded repayment of $79,930,337 in generator surcharges, plus interest, payment of $10 million for lost future generator surcharges, and attorneys' fees. In a press release issued December 9, 1999 the North Carolina Attorney General gave notice to the Commission that North Carolina, having lawfully withdrawn from the Compact, would not recognize the Commission's attempt to impose sanctions. *See* Dec. 9, 1999 Press Release by Attorney General Michael F. Easley (Pet. App. at 139a-40a).

On July 10, 2000 the Commission filed its first Motion for Leave to File Bill of Complaint and Bill of Complaint (No. 131, Original), which was denied by this Court on June 25, 2001. The Commission, along with four of the states that are parties to the Compact, filed a second Motion for Leave to File Bill of Complaint and Bill of Complaint on June 3, 2002.

ARGUMENT

I. THE COMMISSION CANNOT INVOKE THE ORIGINAL JURISDICTION OF THIS COURT BY ADDING FOUR STATES AS NOMINAL PLAINTIFFS.

The constitutional premise that a sovereign state has standing to invoke the original jurisdiction of this Court to hear a suit against another state does not extend to actions in which the plaintiff-state is only a nominal party. This Court has recently reiterated the principle that a "State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens." *Kansas v. Colorado*, 533 U.S. 1, 8, (2001) (citing *Maryland v. Louisiana*, 451 U.S. at 737). A state cannot invoke original jurisdiction for the benefit of particular individuals, even if the state asserts an economic interest in the claim. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938). In order to properly utilize this Court's original jurisdiction, "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Id.* at 396. Where it is apparent that the name of the state is being used simply for the prosecution of a claim of another entity, the original jurisdiction of this Court cannot be maintained. *Kansas v. United States*, 204 U.S. 331, 341 (1907).

A review of the factual basis for the Motion and the proposed Bill of Complaint clearly demonstrates that the plaintiff states are not the real parties in interest concerning the

matters alleged. Plaintiffs seek a monetary award to be paid to the Commission in excess of $90 million from the State of North Carolina, yet none of the funds at issue were ever public funds of the plaintiff states. Nor have the states incurred monetary damages, costs or attorneys' fees as alleged in the proposed Bill of Complaint. It is undisputed that the money plaintiffs seek to recover was "raised exclusively by levying fees and surcharges on wastes being disposed of at the first regional disposal facility in Barnwell, South Carolina." (Motion at 3). The funds collected and distributed by the Commission were received from nuclear waste generators and were never attributable to the treasuries of the party states to the Compact.

Under the explicit terms of the Compact the states are not responsible for its financial obligations. The Commission is a legal entity separate and distinct from the party states, capable of acting on its own behalf, liable for its own actions, and vested with specific statutory rights and obligations. Compact, Article IV (App. at 11a-18a). As noted by the Solicitor General in the brief filed in the prior action:

> The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the Commission–and not the States that are parties to the Compact–dispersed the funds to North Carolina in the first place.

Brief for the United States as *Amicus Curiae* (Pet. App. at 20a). The plaintiff states have not and cannot assert a direct claim for

restitution, reimbursement of funds, monetary damages, costs or attorneys' fees because the money in question never belonged to the states. Moreover, as demonstrated by the Commission's own pleadings, any funds ultimately recovered from North Carolina will become the property of the Commission and will not become public funds of the four states which have been added as plaintiffs in this action.

The fact that the states have been added to the Complaint as merely nominal parties is further demonstrated by the continued presence of the Commission as a named plaintiff and the nature of the relief sought. While the action is styled in terms of enforcing the provisions of the Compact, the relief sought is actually nothing more than a demand that North Carolina be ordered to pay the Commission a monetary award because of an asserted breach of contract. The proposed Bill of Complaint requests neither injunctive relief nor mandatory orders seeking protection of the public health or safety. Furthermore, all of the requested monetary relief would go directly to the Commission treasury. Indeed, the Prayer for Relief in the proposed Bill of Complaint is substantively identical to that requested in the prior Bill of Complaint, an action in which the Commission was the only party, and specifically restricts the relief requested to ratification of actions taken by the Commission. Therefore, it is apparent from these facts that the plaintiff states are not seeking to invoke the original jurisdiction of this Court to vindicate their own interests, but those of the Commission.

The credibility of the Commission's attempt to invoke this Court's original jurisdiction by adding four party states as plaintiffs is further diminished by the notable absence of the remaining party states to the Compact, Mississippi and Georgia. Assuming *arguendo*, that the party states, and not the Commission, are the real parties in interest, the states of Mississippi and Georgia, which have apparently declined to contribute to this façade, are clearly necessary parties. The asserted cause of action implicates their rights and property to the same extent as the rights of the four named plaintiff states. The absence of Mississippi and Georgia as parties to this action therefore reinforces the Commission's own admission that "[t]here is no need to have the States involved in this litigation." (Supplemental Brief in Response to the Brief of the Solicitor General, No. 131, Original, at 5 n. 2)

The source of the funds, the inability of any party state to show a direct entitlement to a discrete portion of the funds disbursed to North Carolina, together with the nature of the relief sought in the proposed Bill of Complaint all point to the inevitable conclusion that the Commission is in fact the real party in interest in this matter and, as has already been determined, cannot invoke the original jurisdiction of this Court. As such, the Commission's transparent attempt to revive the Motion rejected by this Court on June 25, 2001, should be denied.

II. THE NATURE OF THE CASE DOES NOT JUSTIFY THE EXERCISE OF ORIGINAL JURISDICTION.

This Court has consistently reiterated that its original jurisdiction should be invoked sparingly and only in appropriate cases. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). What is "appropriate" involves not only "the seriousness and dignity of the claim" but also the "availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Id.* at 93. As early as 1900 the Court said that its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

The reasons for the Court's cautionary approach to its original jurisdiction were aptly described by Justice Harlan in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493 (1971):

> [A]lthough it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another,

> even though the dispute may be one over which this Court does have original jurisdiction.
>
> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.

Id. at 497.

In exercising this discretion, the Court has frequently observed that its primary role is that of the final appellate court in our judicial system, *id.* at 499, and that the expanding number of original jurisdiction cases may impair and interfere with the discharge of the Court's primary duties. *See Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Massachusetts v. Missouri*, 308 U.S. 1 (1939).

The Court has also emphasized the historical concerns of federalism which fostered the establishment of original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). Substantial consideration is more likely to be given to cases that "implicate serious and important concerns of federalism."

Wyoming v. Oklahoma, 502 U.S. 437, 451 (1992). Chief Justice Rehnquist has, in fact, suggested that the Court restrict its acceptance of suits between states to those involving issues of state sovereignty:

> I would require that the State's claim involve some tangible relation to the State's sovereign interests. Our original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State, but rather should be limited to complaints by States *qua* States. This would include the prototypical original action, boundary disputes, and the familiar cases involving disputes over water rights. In such cases, the State seeks to vindicate its rights as a State, a political entity.

Maryland v. Louisiana, 451 U.S. at 766 (Rehnquist, J. (now C.J.), dissenting).

Plaintiffs in this case move the Court for permission to file a Bill of Complaint against the State of North Carolina alleging causes of action that, in essence, constitute little more than a contract dispute seeking compensatory damages. The proposed Bill of Complaint alleges breach of contract, unjust enrichment, promissory estoppel, "money had and received," and "violation of member states' rights under the Compact." (Motion at 11-14) Resolution of these allegations centers around the issue of whether North Carolina breached the Compact agreement. The relief requested in this second Motion is a straightforward

demand that North Carolina be ordered to pay the Commission monetary damages.[3]

Plaintiffs' suit raises no issues related to the core sovereign interests of the states of North Carolina, Alabama, Florida, Tennessee, or Virginia. Neither the nature of the case, the magnitude of the claim nor the rights asserted against North Carolina are of sufficient scope or breadth to implicate issues of federalism and sovereign state interests requiring initial resolution by this Court.

Plaintiffs further suggest that the Supreme Court should accept this case because North Carolina's actions "have exposed the states to potentially serious threats to the public health and safety of their citizens." (Motion at 26) This suggestion is neither legally nor factually supportable. Although it is clear that a state has a right as *parens patriae* to "bring suit to protect the general comfort, health or property rights of its inhabitants threatened by the proposed or continued action of another State." *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923), it is equally clear that "[b]efore this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious

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[3] The resolution passed by the Commission on December 9, 1999, resolved that North Carolina should repay to the Commission the sum of $79,930,337, plus interest at the applicable legal rate from January 1, 1998; the sum of $10 million resulting from the loss of a source of Commission funds for a twenty-year period, and the Commission's attorneys' fees from June 21, 1999. (Pet. App. at 137a-38a.)

magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

Plaintiffs' Bill of Complaint requests neither injunctive relief nor mandatory orders seeking protection of the public health or safety. The relief sought is purely monetary compensation to be returned to the Commission treasury, which is unlikely to be utilized for many years, if ever, for purposes related to public health or safety.

Nor do Plaintiffs suggest any specific, much less clear and convincing, evidence that serious public health concerns are at stake in this case. In the sixteen years since enactment of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1859, not a single regional low-level radioactive waste disposal site has been constructed by any of the numerous regional compacts throughout the nation. Environmental, technological, safety and political concerns have impeded the progress of site licensing and development in each compact region. During that period, however, existing public and private disposal facilities, combined with regulated on-premise storage programs at generator facilities, have established a demonstrated capability to safely manage low-level radioactive waste in the absence of new regional compact sites. Public policy concerning low-level radioactive waste disposal is being re-evaluated on a national basis. In the interim the "serious public health concerns" asserted by Plaintiffs as a basis for original jurisdiction of this case simply do not exist. (Motion at 20)

III. ALTERNATIVE FORUMS ARE AVAILABLE TO HEAR THE COMMISSION'S CASE.

This Court, in exercising its discretion to make case-by-case judgments as to the exercise of its original jurisdiction, has long considered the availability of an alternative forum to be a paramount factor. *Texas v. New Mexico*, 462 U.S. 554 (1983); *Illinois v. City of Milwaukee*, 406 U.S. 91. In *Arizona v. New Mexico*, 425 U.S. 794 (1976) (*per curiam*), the Court declined to exercise original jurisdiction over a suit brought by Arizona challenging a tax imposed by New Mexico on electricity generated within New Mexico prior to sale to Arizona consumers. In concluding that pending litigation in state court provided an appropriate alternative forum, the Court, quoting from the original jurisdiction standard recited by Justice Douglas in *Illinois v. City of Milwaukee*, 406 U.S. at 93-94, stated:

> We construe 28 U.S.C. § 1251 (a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

Arizona v. New Mexico, 425 U.S. at 796-97.

In seeking leave to file the Bill of Complaint, the plaintiffs cite the Brief of the United States for the proposition that a suit by a member state to enforce the Compact falls within this Court's exclusive original jurisdiction. (Motion at 26) The Commission asserts that the Supreme Court "is the only forum in which the States are guaranteed to receive a fair and impartial ruling as to the proper interpretation and enforcement of the Compact that regulates the relevant relationships among them." (Motion at 27) Quoting from *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), the Commission argues that "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Id.* at 28 (Motion at 27).

It is clear that the Court has not considered the *dicta* from *Sims* cited by the Commission as dispositive of the question whether state courts may be appropriate alternative forums for original jurisdiction cases. That case involved a dispute among West Virginia state officials concerning the constitutionality of a state statute, and did not directly address the issue of appropriate alternative forums for disputes between two states. Indeed, the language relied upon by plaintiffs came "in the context of this Court's *review* of the state court judgment on certiorari." Brief for the United States as *Amicus Curiae* (Pet. App. at 21a)

The Commission's argument for jurisdiction in this Court ignores the analysis set forth in the Brief of the United States explicitly repudiating any reliance upon *Sims* to support a claim

of a lack of an alternative forum. As stated by the Solicitor General in the brief filed in the prior action:

> Contrary to the Commission's contention, *Sims* demonstrates that state courts *are* appropriate fora for resolving interstate compact controversies that do not fall within this Court's exclusive original jurisdiction. This Court may review a state court's interpretation of a compact–which is a matter of federal law–through a writ of certiorari. . . . This Court can accordingly ensure that a state court's initial exercise of jurisdiction over a compact dispute involving a non-State party would not result in a single State being the "ultimate judge" of the federal issues raised in the bill of complaint.

Brief for the United States as *Amicus Curiae* (Pet. App. at 21a-22a) (citations omitted).

This Court has, in fact, frequently concluded that state courts are appropriate alternative forums. *Arizona v. New Mexico*, 425 U.S. 794; *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493; *Massachusetts v. Missouri*, 308 U.S. 1. Although plaintiffs cite *Ohio v. Wyandotte Chemicals Corp.*, in support of its contention that a state court could not adjudicate its claims in an impartial manner, this Court actually concluded that Ohio state courts were an appropriate alternative forum, stating:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest.

401 U.S. at 500. Likewise, there is no merit in the plaintiffs' contention that this contract dispute cannot be fully and fairly heard in North Carolina state courts. Indeed, the Solicitor General characterized the Commission's argument claiming the lack of an adequate alternative forum as "unsound." Brief for the United States as *Amicus Curiae* (Pet. App. at 20a).

IV. NORTH CAROLINA DID NOT BREACH ITS OBLIGATIONS UNDER THE COMPACT.

Plaintiffs request that this Court order North Carolina to show cause why the Commission's sanction decision should not be summarily affirmed and enforced. (Motion at 29) Aside from the jurisdictional issues discussed herein, sound substantive legal reasons support North Carolina's refusal to honor the Commission's resolution. Most significantly, the Compact does not authorize the Commission to impose sanctions on a state which has withdrawn from the Compact. The Compact agreement allows any state to withdraw from the Compact as follows:

> Subject to the provisions of Article VII section (h), any party state may withdraw from the compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the compact.

Compact, Article VII(g) (App. at 24a).

This withdrawal provision does not exempt party states designated as "host states." Nor is a reason required for a state to withdraw. The right to withdraw is, in fact, absolute up to thirty days following the commencement of operation of the second host state disposal facility. Compact, Article VII(h) (App. at 24a). The only requirement is that the state legislature enact a law repealing the Compact.

Furthermore, Article VII(f) only authorizes the Commission to impose sanctions on a "party state." Once the North Carolina General Assembly adopted legislation withdrawing North Carolina from the Compact, North Carolina was no longer a party state and the Commission lost its jurisdiction to impose sanctions.

Plaintiffs rely on Article VII(f) of the Compact agreement for the proposition that the Commission's jurisdiction continued despite North Carolina's withdrawal. This provision states in part:

> Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

Compact, Article VII(f) (App. at 23a-24a, 23a). Read in the context of the sanction provision as a whole, this language does not attempt to address Commission jurisdiction over a state that has withdrawn from the Compact. Subsection (f), in fact, contemplates that the most severe sanction authorized would be expulsion from the Compact, which could have no application to a state which had already withdrawn.

Reading Article VII(f) in *pari materia* with Article VII(g) and (h) so as to give effect to each part requires the conclusion that any party state (other than one where a regional facility is located) has the absolute right to withdraw and immediately terminate its rights and obligations under the Compact. When North Carolina withdrew from the Compact in July, 1999, a sanction complaint had been filed by two party states, but no action had been taken by the Commission. The Commission did not initiate the formal sanction hearing procedure until August, 1999 and did not actually impose sanctions until December, 1999. It could not possibly have been contemplated by the states enacting the Compact that, in so doing, each state became indefinitely bound by the Commission's sanctioning power, even after withdrawal from the Compact. North Carolina was not a party state subject to the jurisdiction of the Commission at the time the sanctions were imposed and,

therefore, has no legal obligation to recognize the Commission's demands.

North Carolina has at all times acted in good faith in its efforts to site and license a disposal facility for the Compact. Upon being chosen as the host state for the second regional disposal facility, North Carolina created the Authority to oversee site selection and development of the disposal facility. North Carolina contracted with Chem-Nuclear, an experienced operator of low-level radioactive waste disposal facilities, to develop the North Carolina site. The Authority provided extensive consultant and staff assistance to Chem-Nuclear in the site selection process and in the submittal of a license application to the Department. Additionally, throughout the period from 1986 to 1999 the Authority worked closely with the Commission, through North Carolina's two Compact Commissioners, to ensure the Commission was informed of North Carolina's progress as it attempted to navigate the myriad legal, technical and political roadblocks inherent in the development of a low-level radioactive waste disposal facility. North Carolina did, however, consistently insist that the party states continue to equitably "distribute the costs, benefits, and obligations of successful low-level radioactive waste management." Compact, Article I (App. at 6a).

It is well documented that project delays were attributable to multiple technical, legal and practical problems. Characterization of one of the initial sites identified for study was delayed by legal challenges and unforeseen geological problems. Poor performance by Chem-Nuclear in certain

respects further compounded the difficulty of satisfying the Department's technical experts that public safety and health issues had been fully addressed. Even at the time development activities ceased at the Wake County site in December, 1997, serious concerns for site suitability were still being debated. Throughout, however, documented progress was achieved within the limits of available funding.

In assuming the role of the second host state, North Carolina's primary responsibility to its citizens was to ensure that safety considerations were paramount in licensing any disposal facility to be constructed. The Compact agreement recognized this duty in reserving to each host state the authority to exercise complete control of the siting, licensing, and regulation of any disposal facility to be constructed within its borders. Compact, Article VI(a)(7) and (9) (App. at 20a). North Carolina exercised this authority in a judicious manner throughout the process, consistently progressing but never allowing demands of expediency to jeopardize the safety and health of its citizens. Any contention by plaintiffs that North Carolina either acted or was obligated to act otherwise is rebutted by both law and the facts relevant to this dispute.

CONCLUSION

The Commission's attempt to invoke the original jurisdiction of this Court to resolve its contract dispute with the State of North Carolina has already been rejected. The Commission's addition of four party states as nominal plaintiffs in an identical action does not constitute a basis for reconsideration of the Court's decision. The Motion should therefore again be denied.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Grayson G. Kelley*
Senior Deputy Attorney General

John F. Maddrey
Special Deputy Attorney General

Jennie Wilhelm Mau
Assistant Attorney General

August 5, 2002

Counsel of Record

APPENDIX

1999 N.C. Session Laws 357 ..... 1a

N.C. GEN.STAT. § 104F-1
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from Governor James B. Hunt, Jr. 27a

December 1, 1997 Letter to Warren G. Corgan
from Richard S. Hodes, M.D. 31a

1999 N.C. SESSION LAWS 357

GENERAL ASSEMBLY OF NORTH CAROLINA
RATIFIED BILL

NORTH CAROLINA SESSION OF 1999

CHAPTER 357
SENATE BILL 247

1999 N.C. ALS 357; 1999 N.C. Sess. Laws 357; 1999 N.C. Ch. 357; 1999 N.C. SB 247

SYNOPSIS: AN ACT TO WITHDRAW NORTH CAROLINA FROM THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT, TO LIMIT THE AUTHORITY OF THE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY AND TO DIRECT THE RADIATION PROTECTION COMMISSION TO STUDY AND FORMULATE A PLAN FOR LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT.

The General Assembly of North Carolina enacts:

[*1] Section 1. In accordance with the provisions of G.S. 104F-1, Article VII, Section (g) of the General Statutes, North Carolina hereby withdraws from membership as a party state in the Southeast Interstate Low-Level Radioactive Waste Management Compact.

[*2] Section 2. Chapter 104F of the General Statutes is repealed.

[*3] Section 3. Notwithstanding any provision of Chapter 104G of the General Statutes to the contrary, the sole function of the North Carolina Low-Level Radioactive Waste Management Authority shall be to take all necessary actions to complete the process of closure and restoration of the proposed Wake County low-level radioactive waste site, and to finalize all other responsibilities and business of the Authority relating to closure and restoration on or before June 30, 2000.

[*4] Section 4. Chapter 104G of the General Statutes is repealed effective July 1, 2000.

[*5] Section 5. The North Carolina Radiation Protection Commission is directed to review and study the current and projected availability and adequacy of facilities for the management of low-level radioactive waste produced by North Carolina generators, and to formulate a recommended plan for complying with North Carolina's responsibilities under the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347, and the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240,99 Stat. 1842, *42 U.S.C. 202* lb, et seq. The Commission shall report its findings and recommendations to the General Assembly on or before May 15, 2000. No license application for a low-level radioactive waste facility shall be issued or considered by the Department of Environment and Natural Resources prior to

action by the General Assembly establishing a plan for future management of low-level radioactive waste.

[*6] Section 6. Sections 1, 2, 3, 5, and 6 of this act are effective when they become law. Section 4 of this act becomes effective July 1, 2000.

HISTORY:
In the General Assembly read three times and ratified this the 20th day of July, 1999.

Signed by the Governor July 26, 1999.

SPONSOR: Lee

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N.C. GEN. STAT. § 104F-1 (REPEALED EFFECTIVE JULY 22, 1999)

§ 104F-1. Compact entered into; form of Compact

The Southeast Interstate Low-Level Radioactive Waste Management Compact is enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

Southeast Interstate Low-Level Radioactive Waste Management Compact

ARTICLE I. Policy and purpose

There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Compact. The party states recognize and declare that each state is responsible for providing for the availability of capacity either within or outside the state for disposal of low-level radioactive waste generated within its borders, except for waste generated as a result of defense activities of the federal government or federal research and development activities. They also recognize that the management of low-level radioactive waste is handled most efficiently on a regional basis. The party states further recognize that the Congress of the United States, by enacting the Low-Level Radioactive Waste Policy Act (P.L. 96-573), has provided for and encouraged the development of low-level radioactive waste compacts as a tool for disposal of such waste. The party states recognize that the safe and efficient management of low-level radioactive waste generated within

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the region requires that sufficient capacity to dispose of such waste be properly provided.

It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort, provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, promote the health and safety of the region, limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region, encourage the reduction of the amounts of low-level waste generated in the region, distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states, and ensure the ecological management of low-level radioactive wastes.

Implicit in the congressional consent to this compact is the expectation by the Congress and the party states that the appropriate federal agencies will actively assist the Compact Commission and the individual party states to this compact by:

1. Expeditious enforcement of federal rules, regulations and laws; and

2. Imposition of sanctions against those found to be in violation of federal rules, regulations and laws; and

3. Timely inspection of their licensees to determine their capability to adhere to such rules, regulations and laws; and

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4. Timely provision of technical assistance to this compact in carrying out their obligations under the Low-Level Radioactive Waste Policy Act, as amended.

ARTICLE II. Definitions

As used in this compact, unless the context clearly requires a different construction:

(a) "Commission" or "Compact Commission" means the Southeast Interstate Low-Level Radioactive Waste Management Commission.

(b) "Facility" means a parcel of land, together with the structures, equipment and improvements thereon or appurtenant thereto, which is used or is being developed for the treatment, storage or disposal of low-level radioactive waste.

(c) "Generator" means any person who produces or possesses low-level radioactive waste in the course of or as an incident to manufacturing, power generation, processing, medical diagnosis and treatment, research, or other industrial or commercial activity. This does not include persons who provide a service to generators by arranging for the collection, transportation, storage or disposal of wastes with respect to such waste generated outside the region.

(d) "High-level waste" means irradiated reactor fuel, liquid wastes from reprocessing irradiated reactor fuel and solids into which such liquid wastes have been converted, and other high-

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level radioactive waste as defined by the U.S. Nuclear Regulatory Commission.

(e) "Host state" means any state in which a regional facility is situated or is being developed.

(f) "Low-level radioactive waste" or "waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel or by-product material as defined in section 11e.(2) of the Atomic Energy Act of 1954, or as may be further defined by federal law or regulation.

(g) "Party state" means any state which is a signatory party to this compact.

(h) "Person" means any individual, corporation, business enterprise or other legal entity (either public or private).

(i) "Region" means the collective party states.

(j) "Regional facility" means (1) a facility as defined in this Article which has been designated, authorized, accepted or approved by the Commission to receive waste or (2) the disposal facility in Barnwell County, South Carolina, owned by the State of South Carolina and as licensed for the burial of low-level radioactive waste on July 1, 1982, but in no event shall this disposal facility serve as a regional facility beyond December 31, 1992.

(k) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any other territorial possession of the United States.

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(*l*) "Transuranic wastes" means waste material containing transuranic elements with contamination levels as determined by the regulations of (1) the U.S. Nuclear Regulatory Commission or (2) any host state, if it is an agreement state under section 274 of the Atomic Energy Act of 1954.

(m) "Waste management" means the storage, treatment or disposal of waste.

ARTICLE III. Rights and obligations

The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights.

(a) Subject to any license issued by the U.S. Nuclear Regulatory Commission or a host state each party state shall have the right to have all wastes generated within the borders stored, treated, or disposed of, as applicable at regional facilities, and additionally shall have the right of access to facilities made available to the region through agreements entered into by the Commission pursuant to Article IV (e)(9). The right of access by a generator within a party state to any regional facility is limited by its adherence to applicable state and federal law and regulation.

(b) If no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a

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regional facility in another party state, the party state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host states and approved by a two-thirds vote of the Commission.

(c) Each party state shall establish the capability to regulate, license and ensure the maintenance and extended care of any facility within its borders. Host states are responsible for the availability, the subsequent post closure observation and maintenance, and the extended institutional control of their regional facilities, in accordance with the provisions of Article V, section (b).

(d) Each party state shall establish the capability to enforce any applicable federal or state laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders.

(e) Each party state shall provide to the Commission on an annual basis, any data and information necessary to the implementation of the Commission's responsibilities. Each party state shall establish the capability to obtain any data and information necessary to meet its obligation herein defined.

(f) Each party state shall, to the extent authorized by federal law, require generators within its borders to use the best available waste management technologies and practices to minimize the volumes of wastes requiring disposal.

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ARTICLE IV. The Commission

(a) There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Commission, ("the Commission" or "Compact Commission"). The Commission shall consist of two voting members from each party state to be appointed according to the laws of each state. The appointing authorities of each state must notify the Commission in writing of the identity of its members and any alternates. An alternate may act on behalf of the member only in the member's absence.

(b) Each Commission member shall be entitled to one vote. No action of the Commission shall be binding unless a majority of the total membership cast their vote in the affirmative, or unless a greater than majority vote is specifically required by any other provision of this compact.

(c) The Commission shall elect from among its members a presiding officer. The Commission shall adopt and publish, in convenient form, by-laws which are consistent with this compact.

(d) The Commission shall meet at least once a year and shall also meet upon the call of the presiding officer, by petition of a majority of the party states, or upon the call of a host state. All meetings of the Commission shall be open to the public.

(e) The Commission has the following duties and powers:

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(1) To receive and approve the application of a nonparty state to become an eligible state in accordance with Article VII (b), and

(2) To receive and approve the application of an eligible state to become a party state in accordance with Article VII (c); and

(3) To submit an annual report and other communications to the governors and to the presiding officer of each body of the legislature of the party states regarding the activities of the Commission; and

(4) To develop and use procedures for determining, consistent with considerations for public health and safety, the type and number of regional facilities which are presently necessary and which are projected to be necessary to manage waste generated within the region; and

(5) To provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities; and

(6) To develop and adopt within one year after the Commission is constituted as provided for in Article VII, section (d), procedures and criteria for identifying a party state as a host state for a regional facility as determined pursuant to the requirements of this Article. In accordance with these procedures and criteria, the Commission shall identify a host

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state for the development of a second regional disposal facility within three years after the Commission is constituted as provided for in Article VII, section (d) and shall seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991.

In developing criteria, the Commission must consider the following: the health, safety, and welfare of the citizens of the party states; the existence of regional facilities within each party state; the minimization of waste transportation; the volumes and types of wastes generated within each party state; and the environmental, economic and ecological impacts on the air, land, and water resources of the party states.

The Commission shall conduct such hearings; require such reports, studies, evidence and testimony; and do what is required by its approved procedures in order to identify a party state as a host state for a needed facility; and

(7) In accordance with the procedures and criteria developed pursuant to section (e)(6) of this Article, to designate, by a two-thirds vote, a host state for the establishment of a needed regional facility. The Commission shall not exercise this authority unless the party states have failed to voluntarily pursue the development of such facility. The Commission shall have the authority to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility; and

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(8) To require of and obtain from party states, eligible states seeking to become party states, and non-party states seeking to become eligible states, data and information necessary to the implementation of Commission responsibilities; and

(9) Notwithstanding any other provision of this compact, to enter into agreements with any person, state, or similar regional body or group of states for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. Such authorization to import requires a two-thirds majority vote of the Commission, including an affirmative vote of both representatives of the host state in which any affected regional facility is located. This shall be done only after an assessment of the affected facilities' capability to handle such wastes; and

(10) To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states, as an intervenor or party in interest before Congress, state legislatures, any court of law, or federal, state or local agency, board or commission which has jurisdiction over the management of wastes. The authority to act, intervene or otherwise appear shall be exercised by the Commission only after approval by a majority vote of the Commission; and

(11) To revoke the membership of a party state in accordance with Article VII (f).

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(f) The Commission may establish such advisory committees as it deems necessary for the purpose of advising the Commission on any and all matters pertaining to the management of low-level radioactive waste.

(g) The Commission may appoint or contract for and compensate such limited staff necessary to carry out its duties and functions. The staff shall serve at the Commission's pleasure irrespective of the civil service, personnel or other merit laws of any of the party states or the federal government and shall be compensated from funds of the Commission. In selecting any staff, the Commission shall assure that the staff has adequate experience and formal training to carry out such functions as may be assigned to it by the Commission. If the Commission has a headquarters it shall be in a party state.

(h) Funding for the Commission shall be provided as follows:

(1) Each eligible state, upon becoming a party state, shall pay twenty-five thousand dollars ($25,000) to the Commission which shall be used for costs of the Commission's services.

(2) Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which:

a. Shall be sufficient to cover the annual budget of the Commission; and

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b. Shall represent the financial commitments of all party states to the Commission; and

c. Shall be paid to the Commission, provided, however, that each host state collecting such fees or surcharges may retain a portion of the collection sufficient to cover its administrative costs of collection, and that the remainder be sufficient only to cover the approved annual budgets of the Commission.

(3) The Commission shall set and approve its first annual budget as soon as practicable after its initial meeting. Host states for disposal facilities shall begin imposition of the special fees and surcharges provided for in this section as soon as practicable after becoming party states, and shall remit to the Commission funds resulting from collection of such special fees and surcharges within 60 days of their receipt.

(i) The Commission shall keep accurate accounts of all receipts and disbursements. An independent certified public accountant shall annually audit all receipts and disbursements of Commission funds, and submit an audit report to the Commission. Such audit report shall be made a part of the annual report of the Commission required by Article IV (e)(3).

(j) The Commission may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person,

firm or corporation, and may receive, utilize and dispose of the same. The nature, amount and condition, if any, attendant upon any donation or grant accepted pursuant to this paragraph together with the identity of the donor, grantor or lendor, shall be detailed in the annual report of the Commission.

(k) The Commission shall not be responsible for any costs associated with (1) the creation of any facility, (2) the operation of any facility, (3) the stabilization and closure of any facility, (4) the post-closure observation, and maintenance of any facility, or (5) the extended institutional control, after post-closure observation and maintenance of any facility.

(*l*) As of January 1, 1986, the management of wastes at regional facilities is restricted to wastes generated within the region, and to wastes generated within non-party states when authorized by the Commission pursuant to the provisions of this compact. After January 1, 1986, the Commission may prohibit the exportation of waste from the region for the purposes of management.

(m) (1) The Commission herein established is a legal entity separate and distinct from the party states, capable of acting in its own behalf, and shall be so liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states. Members of the Commission shall not be personally liable for action taken by them in their official capacity.

(2) Except as specifically provided in this compact, nothing in this compact shall be construed to alter the incidence

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of liability of any kind for any act, omission, course of conduct, or on account of any causal or other relationships. Generators, transporters of wastes, owners and operators of sites shall be liable for their acts, omissions, conduct, or relationships in accordance with all laws relating thereto.

ARTICLE V. Development and operation of facilities

(a) Any party state which becomes a host state in which a regional facility is operated, shall not be designated by the Compact Commission as a host state for an additional regional facility until each party state has fulfilled its obligation, as determined by the Commission, to have a regional facility operated within its borders.

(b) A host state desiring to close a regional facility located within its borders may do so only after notifying the Commission in writing of its intention to do so and the reasons therefor. Such notification shall be given to the Commission at least four years prior to the intended date of closure. Notwithstanding the four year notice requirement herein provided, a host state is not prevented from closing its facility or establishing conditions of use and operations as necessary for the protection of the health and safety of its citizens. A host state may terminate or limit access to its regional facility if it determines Congress has materially altered the conditions of this compact.

(c) Each party state designated as a host state for a regional facility shall take appropriate steps to ensure that an application

for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority.

(d) No party state shall have any form of arbitrary prohibition on the treatment, storage or disposal of low-level radioactive waste within its borders.

(e) No party state shall be required to operate a regional facility for longer than a 20-year period, or to dispose of more than 32,000,000 cubic feet of low-level radioactive waste, whichever first occurs.

ARTICLE VI. Other laws and regulations

(a) Nothing in this compact shall be construed to:

(1) Abrogate or limit the applicability of any act of Congress or diminish or otherwise impair the jurisdiction of any federal agency expressly conferred thereon by the Congress;

(2) Abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an agreement state under section 274 of the Atomic Energy Act of 1954 in which a regional facility is located;

(3) Make inapplicable to any person or circumstance any other law of a party state which is not inconsistent with this compact;

(4) Make unlawful the continued development and operation of any facility already licensed for development or operation on the date this compact becomes effective, except

that any such facility shall comply with Article III, Article IV and Article V and shall be subject to any action lawfully taken pursuant thereto;

(5) Prohibit any storage or treatment of waste by the generator on its own premises;

(6) Affect any judicial or administrative proceeding pending on the effective date of this compact;

(7) Alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions;

(8) Affect the generation, treatment, storage or disposal of waste generated by the atomic energy defense activities of the Secretary of the U.S. Department of Energy or federal research and development activities as defined in P.L. 96-573;

(9) Affect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders or to affect the rights and powers of any party state and its political subdivisions to tax or impose fees on the waste managed at any facility within its borders.

(b) No party state shall pass any law or adopt any regulation which is inconsistent with this compact. To do so may jeopardize the membership status of the party state.

(c) Upon formation of the compact no law or regulation of a party state or of any subdivision or instrumentality thereof may be applied so as to restrict or make more inconvenient

access to any regional facility by the generators of another party state than for the generators of the state where the facility is situated.

(d) Restrictions of waste management of regional facilities pursuant to Article IV(1) shall be enforceable as a matter of state law.

ARTICLE VII. Eligible parties, withdrawal, revocation, entry into force, termination

(a) This compact shall have as initially eligible parties the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

(b) Any state not expressly declared eligible to become a party state to this compact in section (a) of this Article may petition the Commission, once constituted, to be declared eligible. The Commission may establish such conditions as it deems necessary and appropriate to be met by a state wishing to become eligible to become a party state to this compact pursuant to the provisions of this section. Upon satisfactorily meeting such conditions and upon the affirmative vote of two-thirds of the Commission, including the affirmative vote of both representatives of a host state in which any affected regional facility is located, the petitioning state shall be eligible to become a party state to this compact and may become a party state in the same manner as those states declared eligible in section (a) of this Article.

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(c) Each state eligible to become a party state to this compact is declared a party state upon enactment of this compact into law by that state and upon payment of the fees required by Article IV (h)(1). The Commission shall be the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

(d) (1) The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article IV (h)(1) shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission, shall cause legislation to be introduced in the Congress which grants the consent of the Congress to this compact, and shall do those things necessary to organize the Commission and implement the provisions of this compact.

(2) All succeeding states eligible to become party states to this compact shall be declared party states pursuant to the provisions of section (c) of this Article.

(3) The consent of the Congress shall be required for full implementation of this compact. The provisions of Article V, section (d) shall not become effective until the effective date of the import ban authorized by Article IV, section (*l*) as

approved by Congress. The Congress may by law withdraw its consent only every five years.

(e) No state which holds membership in any other regional compact for the management of low-level radioactive waste may be considered by the Compact Commission for eligible state status or party state status.

(f) Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state. Any sanction shall be imposed only on the affirmative vote of at least two-thirds of the Commission members. Revocation of party state status may take effect on the date of the meeting at which the Commission approves the resolution imposing such sanction, but in no event shall revocation take effect later than 90 days from the date of such meeting. Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

The Commission shall, as soon as practicable after the meeting at which a resolution revoking status as a party state is approved, provide written notice of the action along with a copy of the resolution to the governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of

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the party states, as well as chairmen of the appropriate committees of the Congress.

(g) Subject to the provisions of Article VII section (h), any party state may withdraw from this compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the compact. The Commission, upon receipt of the notification, shall as soon as practicable provide copies of such notification to the governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states as well as the chairmen of the appropriate committees of the Congress.

(h) The right of a party state to withdraw pursuant to Article VII section (g) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress. For purposes of this section, the low-level radioactive waste disposal facility located in Barnwell County, South Carolina shall be considered the first host state disposal facility.

(i) This compact may be terminated only by the affirmative action of the Congress or by the rescission of all laws enacting the compact in each party state.

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ARTICLE VIII. Penalties

(a) Each party state, consistently with its own law, shall prescribe and enforce penalties against any person not an official of another state for violation of any provision of this compact.

(b) Each party state acknowledges that the receipt by a host state of waste packaged or transported in violation of applicable laws and regulations can result in imposition of sanctions by the host state which may include suspension or revocation of the violator's right of access to the facility in the host state.

ARTICLE IX. Severability and construction

The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared by a court of competent jurisdiction to be contrary to the Constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any other government, agency, person or circumstance shall not be affected thereby. If any provision of this compact shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the state affected as to all severable matters. The provisions of this compact shall be liberally construed to give effect to the purposes thereof.

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HISTORY: 1983. c. 714, s. 1; 1987, c. 850, s. 25.

NOTES:

APRIL 8, 1996 LETTER TO RICHARD S. HODES, M.D. FROM GOVERNOR JAMES B. HUNT, JR.

April 8, 1996

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission For Low-Level
Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, NC 27603

Dear Dr. Hodes:

Thank you for your January 5, 1996, letter regarding future Southeast Compact funding of North Carolina's low-level radioactive waste (LLRW) disposal facility siting effort. While North Carolina has funded almost 30 percent of the project costs to date, the Southeast Compact has appropriately funded the major portion of our site development efforts. Accordingly, the potential interruption of Southeast Compact funding described in your letter is a matter of great concern.

You express understandable concern about the cost overruns and delays that we have experienced with the project. I share those concerns. In my view, they are attributable primarily to two factors. First, the North Carolina LLRW Management Authority (on the recommendation of its contractor Chem-Nuclear) selected a geologically complex site that has not proved easy to characterize and understand. It

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remains unclear whether this site can be modeled and monitored with reasonable assurance, although the authority and its contractors continue to work to resolve those questions. Second, it has now been recognized by the Authority and its independent consultant, Harding Lawson Associations, that there were significant problems and shortcomings in the Chem-Nuclear license application that must be reworked and addressed. Toward that end, changes were made last year in Chem-Nuclear's management of the project and Harding Lawson Associates has been involved on an ongoing basis in designing a work plan to carry the project forward.

The conflicting reports from the Division of Radiation Protection (DRP) and the Authority which you reference pertain to the adequacy of the work plan proposed by the Authority in January and the likelihood that such a work plan will lead to a favorable licensing decision. Based on the reports I have received from recent meetings of our Inter-Agency Committee on LLRW, I am convinced that additional work needs to be done on this work plan.

At my direction the Authority and DRP have been engaged in a series of intensive meetings designed to produce a revised work plan which both agencies believe is realistic. This revised work plan will put us in a better position to provide the Compact Commission with a reasonable estimate of the time and costs that will be involved in getting to a licensing decision

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as well as, with some intermediate decision points at which the project should be reevaluated in the event of unfavorable outcomes. However, because of the uncertainty of the outcome of the work that remains to be done, it will continue to be difficult, if not impossible, to forecast the likely outcome of this plan to work.

I appreciate your expression of the Commission's continuing support for our site development efforts. Please be assured that North Carolina remains committed to fulfilling its obligations under the Southeast Compact and will continue to work diligently toward that end. However, when the revised work plan is completed, it will be necessary and appropriate for the Compact Commission to decide whether it will provide continued funding for this project.

Based on your letter it appears that the prospects for future funding of the North Carolina siting efforts are not good. First, you indicate that the Compact Commission has conditioned any future funding on a financial investment in the project by Chem-Nuclear. My understanding is that Chem-Nuclear has declined to make such an investment. Second, you suggest that the Compact Commission will be unable to fund the completion of the project and that North Carolina will need to make "alternate plans" to fund the completion the project. It is highly unlikely that the North Carolina General Assembly would assume a greater portion or the financial responsibility

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for the project than it has done to date, and I would not recommend that it do so. If that means that the future of the project is in jeopardy, then I suggest the Compact Commission move immediately to determine how best to address this problem.

My warmest personal regards.

Sincerely

/s/ James B. Hunt, Jr.

JBH:caw
cc: Rep. George W. Miller, Jr.
Capt. William Briner
Warren Corgan
John MacMillan
Steve Levitas
Dayne Brown

DECEMBER 1, 1997 LETTER TO WARREN G. CORGAN FROM RICHARD S. HODES, M.D.

December 1, 1997

Mr. Warren G. Corgan, Chairman
North Carolina Low-Level Radioactive Waste Management Authority
116 West Jones Street, Suite 2109
Raleigh, NC 27603-8003

Dear Warren:

I am in receipt of your letter of November 25 in which you relay the views of the Authority with regard to the draft Memorandum of Understanding (MOU). Since the letter neither discloses an agreement in principle with the MOU nor offers an alternative funding mechanism with the appropriate concurrences, it fails to meet the Commission's requirements for future funding expressed in the resolutions of the Commission dated August 21, 1997 and November 7, 1997. Accordingly, I cannot authorize the release of funds for work beyond November 30 nor would it be appropriate to convene a meeting of the Commission to consider the Authority's response at this time.

The Commission remains dedicated to work with the Authority and waste generators to develop a plan to share the cost for site development in North Carolina. We will meet at any time with

(15)

No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

PETITIONERS' REPLY BRIEF

VIRGINIA A. SEITZ
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

CARTER G. PHILLIPS*
COLLEEN M. LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for Plaintiffs

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

August 21, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BILL PRYOR
ATTORNEY GENERAL
Office of the Attorney General
Alabama State House
11 South Union Street
Third Floor
Montgomery, Alabama 36130
(334) 242-7300

BOB BUTTERWORTH
ATTORNEY GENERAL
Office of the Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399
(850) 487-1963

PAUL G. SUMMERS
ATTORNEY GENERAL
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3491

JERRY W. KILGORE
ATTORNEY GENERAL
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

Attorneys for Plaintiffs

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Omnibus Low-Level Radioactive Waste Intertate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1859 (1986) 1, 6, 9

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Stern et al., *Supreme Court Practice* (6th ed. 1986) 4

PETITIONERS' REPLY BRIEF

In this original action, four sovereign States seek enforcement of *their* contract with the State of North Carolina. That contract is an interstate compact, the Southeast Interstate Low-Level Radioactive Waste Management Compact, that was enacted into federal law by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act ("Compact"). Pub. L. No. 99-240, 99 Stat. 1859 (1986). Disparaging the sovereign acts that both created and seek to enforce the legal obligations at issue, North Carolina's principal argument in opposition is that this case falls outside the Court's exclusive original jurisdiction because the plaintiff States are nominal parties without a direct interest in this action. This argument is patently wrong.

The plaintiff States are parties to a contract with North Carolina with a direct interest in the enforcement of the legal obligations created therein. The Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission") is purely a creature of the Compact that established it and the State representatives that control it. North Carolina's legal duty to its contract partners is the source of its obligation to pay damages to the Commission. This Court has often recognized that states have a direct and significant interest in the enforcement of interstate compacts.

Substantial issues of federal law are at stake here. The contract at issue is an interstate compact and a federal law embodying Congress' express determination that states bear primary responsibility for disposal of low-level radioactive waste and should form interstate compacts to develop disposal facilities and promote public health and safety. See Motion for Leave to File Bill of Complaint 2 ("Mot."). Moreover, this dispute among the States cannot be heard in any other forum. It concerns questions of federal law, specifically interstate compact interpretation, where this Court has the strongest "claim to . . . expertise." *Ohio* v.

Wyandotte Chems. Corp., 401 U.S. 493, 505 (1971). This Court should exercise its exclusive original jurisdiction.

1. The Plaintiff States Are Not Nominal Parties. Plaintiffs have no quarrel with the principle that a state cannot invoke original jurisdiction "'as a nominal party in order to forward the claims of individual citizens.'" *Kansas* v. *Colorado*, 533 U.S. 1, 8 (2001). That principal, however, has no application where, as here, four States seek to enforce a contract, an interstate compact, to which they are parties. See, *e.g.*, Bill of Complaint 11 ("Count I – Violation of Member States' Rights Under the Compact"); *id.* at 12 ("Count II – Breach of Contract"). This Court has routinely exercised its original jurisdiction to interpret and enforce such interstate compacts. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1 (2001); *Nebraska* v. *Iowa*, 406 U.S. 117 (1972). "There is no doubt that this Court's jurisdiction to resolve controversies between two States . . . extends to a suit by one State to enforce its compact with another State or *to declare rights under a compact*." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983) (emphasis supplied) (citing, *inter alia*, *Virginia* v. *West Virginia*, 206 U.S. 290, 317-19 (1907)). A state plainly has a direct interest in enforcing its rights under a contract and an interstate compact. Our research has disclosed no case in which the Court has dismissed a state's complaint against another state seeking to enforce an interstate compact.

North Carolina's contention that the plaintiff States are simply cat's paws for the Commission, lacking any direct interest in North Carolina's breach of the Compact, is baseless. North Carolina's failure to develop, license, and construct a disposal site pursuant to its contractual obligations injured all member States. North Carolina accepted the benefits of Compact membership (disposing of its waste at the South Carolina facility) and millions of dollars to provide the next disposal site, and then breached the Compact. As a result, the member States lost invaluable time, substantial funds (approximately $80 million that could have been

invested to produce a disposal site in another member State), and access to a disposal facility. In seeking to enforce the Compact, the plaintiff States therefore are directly vindicating their own interests and redressing an injury that "affects the general population of [their] State[s] in a substantial way." *Maryland* v. *Louisiana*, 451 U.S. 725, 737 (1981).

Moreover, two States initiated the enforcement proceeding underlying this original action (by filing the sanctions complaint pursuant to the Compact), and four States filed this original action. Nothing in this record indicates that the States did so as pawns of the Commission.[1]

Nevertheless, North Carolina contends, the plaintiff States are only nominal parties because they have no direct interest in the $80 million owed to the Commission and "none of the funds at issue were ever public funds of the plaintiff states." Opp. 13. This is beside the point, see *supra*, and wrong. Leaving aside each State's initial $25,000 contribution to the Commission, the Compact also provides that:

> [e]ach state hosting a regional disposal facility shall annually *levy special fees or surcharges* on all users of such facility . . . the total of which . . . b. *Shall represent*

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[1] North Carolina's citations reveal how far afield its argument is. *See Kansas* v. *Colorado*, 533 U.S. at 8-9 (*rejecting* the argument that Kansas was a nominal party and that farmers were the real parties in interest, explaining that "[w]hen a state properly invokes our jurisdiction to seek redress for a wrong perpetrated against it by a sister State, neither the measure of damages that we ultimately determine to be proper nor our method for calculating those damages can retrospectively negate our jurisdiction"), *Maryland* v. *Louisiana*, 451 U.S. at 737 (holding that the State was not a nominal party, because it was a consumer of natural gas subject to the other State's tax and the injury alleged "affect[ed] the general population of a State in a substantial way"), *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 394 (1938) (holding that the State was a nominal party when it assumed title to assets of a bank's creditors in order to represent their interests against another State). The plaintiff States here represent their own contract interests and the interests of the general population in enforcing the Compact

> *the financial commitments of all party states to the Commission*, and c. Shall be paid to the Commission. [Opp. App. 15a-16a (emphasis supplied).]

Thus, the Compact expressly provides that the funds resulting from the levy represent "the financial commitments of all party States to the Commission." *Id.* at 16a. Moreover, each State has a direct interest in recouping that money in order to address the need for long-term access to alternative disposal facilities in light of North Carolina's failure to provide any.

North Carolina also contends that "the continued presence of the Commission as a named plaintiff and the nature of the relief sought" demonstrates that the States are only nominal parties. Opp. 14. This contention, too, is obviously wrong. "[P]rovided at least one state is on each side of the controversy, the presence of non-state parties, even indispensable parties, does not affect the exclusive jurisdiction of the Supreme Court." Stern et al., *Supreme Court Practice* 475 (6th ed. 1986) (citing *Arizona* v. *California*, 373 U.S. 546, 564 (1963) (allowing Indian tribes to intervene in original action)); *Maryland* v. *Louisiana*, 451 U.S. at 735-44 & n.21 ("it is not unusual to permit intervention of private parties in original actions").[2]

The States and the Commission each have direct interests. The interest of the latter does not diminish the interest of the former. This Court should exercise original jurisdiction here.

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[2] *See also Texas* v. *Louisiana*, 416 U.S. 965 (1974) (permitting a Texas municipality to intervene in a boundary dispute between states that affected its borders); *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (allowing private parties to intervene in boundary dispute that affected them). For similar reasons, it is irrelevant that two party States, for unspecified reasons of their own, elected not to be plaintiffs here. Because four member States are plaintiffs and all member States authorized the Commission to be a plaintiff, the other States are not necessary parties.

2. The Nature Of The Case Strongly Supports The Exercise Of Original Jurisdiction. Two factors determine whether the Court will exercise its original jurisdiction: "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim'" and the "availability of an alternative forum in which the issue tendered can be resolved." *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) (citation omitted). Both considerations support jurisdiction here.

a. North Carolina contends that this dispute is unworthy of the Court's attention because it seeks money damages and does not implicate federal questions of importance to states as sovereigns. It could not be more wrong on both counts.

The issues presented here are federal questions involving the interpretation and enforcement of an interstate compact, a "law of the United States." *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981). "The legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question for this Court." *State ex rel. Dyer* v. *Sims*, 341 U.S. 22, 35 (1951) (Jackson, J., concurring). Like other interstate compacts, this Compact is a unique vehicle addressing an issue of regional and national importance. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-79 (1959) (the Court "must treat the compact as a living interstate agreement which performs high functions in our federalism"); *Dyer*, 341 U.S. at 27 (compacts are responsive to the "growing interdependence of regional interests, calling for regional adjustments").

Interstate compacts, such as this one, are important components of the federal system; and their enforcement by this Court is necessary to their actual and perceived effectiveness. Review of the issues presented in this case is doubly necessary, because it directly implicates not only the willingness of this Court to act as a neutral arbiter among individual states, but also the ability of member states to enforce compacts against states who seek to withdraw from

compacts to avoid the consequences of the breach of their legal obligations thereunder.

The fact that the States seek compensatory damages does not detract from the important federal questions and policies implicated here. As set forth *supra*, this Court routinely exercises its original jurisdiction to interpret and enforce compacts. It has also done so in cases involving interstate disputes over contractual and other monetary obligations. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. at 735-38 (granting original jurisdiction to decide the validity of a tax on natural gas uses); *Kentucky* v. *Indiana*, 281 U.S. 163, 177-78 (1930) (granting original jurisdiction in a dispute regarding a contract to build a bridge between two states); *South Dakota* v. *North Carolina*, 192 U.S. 286, 312 (1904) (granting original jurisdiction in a "claim for money due on a written promise to pay"). Indeed, this Court exercises jurisdiction in "controversies arising upon pecuniary demands . . . just as in those for the prevention of the flow of polluted water from one State along the borders of another State." *Virginia* v. *West Virginia*, 206 U.S. 290, 319 (1907).

Finally, although North Carolina scoffs at the public health and safety concerns here, those concerns unquestionably increase the importance of the federal issues presented. The Compact was enacted by Congress for the express purpose of "promot[ing] the health and safety of the region." Compact, Art. 1, 99 Stat. at 1872.[3] Surely states are not required to wait until the danger to public health and safety is immediate and requires injunctive relief to invoke this Court's original jurisdiction. See *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901) (where "the health and comfort of the inhabitants of a State are threatened," the State must be allowed a remedy). Equally to the point, it is for Congress, not North Carolina, to

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[3] Tr. at 13 (Bill of Complaint App. B 24a) (the Compact faces "a prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive material due to lack of disposal facility").

determine whether the issue of low-level radioactive waste disposal is an important and urgent issue of public safety and health – and this they did.

b. There is no pending federal or state court litigation to resolve this dispute; nor is there any alternative forum for its resolution. This Court has exclusive original jurisdiction over actions among states. North Carolina ignores that the member States cannot have their dispute about the interpretation and enforcement of the Compact resolved other than in this Court.

The Commission's filing of a federal court action against North Carolina is also problematic. If the Commission is not a state for this purpose, as North Carolina and the United States assert, the Eleventh Amendment is an obvious hurdle. *Alden* v. *Maine*, 527 U.S. 706, 728 (1999). The only forum with undisputed federal jurisdiction is this Court.

Nor are North Carolina's courts an adequate alternative. This Court has often noted the importance of an impartial federal tribunal in suits between states, see Mot. 26-28, and has never required a state to enforce an interstate compact against another state in the latter's courts. While this Court has deemed a federal district court an adequate alternative forum, *e.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 108 (1972), it has only once expressly refused to exercise its original jurisdiction in a controversy between states based on the availability of a state court forum.[4]

In *Arizona* v. *New Mexico*, 425 U.S. 794 (1976), relied on by North Carolina, the Court declined to exercise jurisdiction over a challenge to a discriminatory energy tax. But, as this Court made clear, it did so because there was an ongoing state court action presenting the same issues in which Arizona was

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[4] Leave to file a bill of complaint was denied without opinion in *California* v. *West Virginia*, 454 U.S. 1027 (1981), a case involving breach of a contract to play a college football game. That denial appears to rest on the nature of the claim.

represented and because Arizona had not suffered any harm. See *Maryland* v. *Louisiana*, 451 U.S. at 742-44. Moreover, in the subsequent case of *Wyoming* v. *Oklahoma*, 502 U.S. 437, 451-54 (1992), the Court exercised its jurisdiction despite the availability of a state forum because no action had commenced in the state forum. In addition, in *Maryland* v. *Louisiana*, 451 U.S. at 742-44, the Court exercised its original jurisdiction *despite* the existence of an ongoing action because the State was not represented in that action and because the State's interests had been harmed. Cf. *California* v. *Texas*, 457 U.S. 164 (1982) (per curiam) (exercising original jurisdiction due to unavailability of federal district court forum without considering state court fora). The Court has been deeply reluctant to deem a state court an adequate forum for the resolution of disputes among states involving federal law.[5]

Finally, the inadequacy of the North Carolina courts is apparent for yet another dispositive reason. North Carolina has not expressly waived its right to sovereign immunity in a suit to enforce the Compact in its own courts, see Opp. 21-24, despite invitations to do so. The North Carolina courts have not addressed whether the State is immune from a suit to enforce an interstate compact. Compare *Smith* v. *North Carolina*, 222 S.E.2d 412, 423-24 (N.C. 1976) (holding that sovereign immunity does not bar a lawsuit against the State by one of its employees for breach of contract), with *North Carolina Dep't of Transp.* v. *Davenport*, 432 S.E.2d 303, 305 (N.C. 1988) (holding that North Carolina's sovereign immunity is absolute and unqualified unless expressly waived). It is perfectly clear, however, that neither the

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[5] The other cases relied on by North Carolina are entirely inapt. *Wyandotte Chemicals Corp.*, 401 U.S. at 494, did not involve two states, but rather a State and private parties. Similarly, in *Massachusetts* v. *Missouri*, 308 U.S. 1, 17-19 (1939), the Court found that the putative controversy between two States was non-justiciable and that the real controversy was between a State and nonresident citizens.

Commission nor the plaintiff States could "obtain execution to enforce the judgment" if one were rendered. *Smith*, 222 S.E.2d at 424. Instead, "[s]atisfaction w[ould] depend upon the manner in which the General Assembly discharges its constitutional duties." *Id.* On this basis alone, the North Carolina courts are not an adequate alternative forum for the resolution of this dispute among sovereign States.

"[N]o State should be compelled to resort to the tribunals of other States for redress." *Wyandotte Chems. Corp.*, 401 U.S. at 500. This Court should exercise original jurisdiction here.

3. The Imposition Of Sanctions Was Fully Warranted. North Carolina distorts the plain meaning of the Compact, arguing that it can take $80 million, breach the Compact, and avoid sanctions by withdrawing. Its interpretation makes a mockery of this Compact and all others.

Contrary to North Carolina (Opp. 25-26), the plain language of the Compact explicitly addresses a member State's continuing obligations despite withdrawal or any other attempt to evade sanctions. It provides that "[a]ny party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission." Compact, Art. 7(F), 99 Stat. at 1879. Critically, the Compact expressly states that the rights and obligations of party States do not terminate immediately, but rather upon "the effective date of the sanction or as provided in the resolution of the Commission imposing the sanction." *Id.* The plaintiff States do not contend that North Carolina's obligations continue "indefinitely," Opp. 26 – only until North Carolina satisfies the judgment of sanction.[6]

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[6] The plain language of the contract is consistent with the federal common law. Where a contract provides a dispute resolution process, that process governs all disputes arising out of the contract, even if the contract has expired. *See, e.g., Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 196-98 (1991); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l,*

North Carolina's further factual contention that it has acted in good faith is belied by the facts alleged. North Carolina claims that it was not responsible for funding the disposal site, see Opp. 6, but the Compact expressly provides that the Commission is not responsible and that the member States share the funding burden by rotating responsibility for hosting a disposal site, see Mot. 5-6. North Carolina also claims it "had no option but to discontinue site development activities," Opp. 10, due to a shortage of funds from the Commission. In truth, the Commission and waste generators offered North Carolina an alternative plan to finish the project, which it declined and refused to offer any alternative of its own, plainly not acts of good faith. See Mot. 14-15. Further, it refused to bring itself into compliance, defend its actions at the sanction proceeding, or pay the sanction unanimously-imposed by the other member States.[7]

Plaintiffs seek enforcement of a sanction order issued pursuant to the Compact. The principal legal issues are whether under the Compact the Commission acted within its jurisdiction in imposing a sanction on North Carolina and whether that order can be enforced. These are federal law issues of interstate compact interpretation and enforcement that this Court is uniquely competent to decide under our constitutional plan for resolving disputes among sovereign states.

CONCLUSION

The Court should grant Plaintiffs' motion for leave to file the Complaint.

Inc., 1 F.3d 639, 643 (7th Cir. 1993). *A fortiori*, a party that unilaterally withdraws from a contract is subject to the contract's dispute resolution process for disputes arising under the contract.

[7] North Carolina attempts to justify its own misconduct by claiming that South Carolina violated the Compact when it finally withdrew from the Compact in 1995. Opp. 8. South Carolina, in fact, gave four years notice before acting and, accordingly, did not violate the Compact. *See* Mot. 8.

Respectfully submitted,

VIRGINIA A. SEITZ
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

BILL PRYOR
ATTORNEY GENERAL
Office of the Attorney General
Alabama State House
11 South Union Street
Third Floor
Montgomery, Alabama 36130
(334) 242-7300

BOB BUTTERWORTH
ATTORNEY GENERAL
Office of the Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399
(850) 487-1963

CARTER G. PHILLIPS*
COLLEEN M. LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

PAUL G. SUMMERS
ATTORNEY GENERAL
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3491

JERRY W. KILGORE
ATTORNEY GENERAL
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

Attorneys for Plaintiffs

August 21, 2002

* Counsel of Record

(19)

No. 132, Original

In the Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION, PLAINTIFFS

v.

STATE OF NORTH CAROLINA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

PATRICIA WEISS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether this Court should exercise its original and exclusive jurisdiction, under 28 U.S.C. 1251(a), over a suit, brought by four States and a compact commission against another compacting State, seeking a remedy for an alleged breach of an interstate compact addressing the regional management of low-level radioactive waste.

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v.

STATE OF NORTH CAROLINA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

Article III, Section 2, of the United States Constitution provides that this Court shall have original jurisdiction over cases "in which a State shall be Party." U.S. Const. Art. III, § 2. Congress has additionally provided that the Court shall have original and exclusive jurisdiction over "all controversies between two or more States." 28 U.S.C. 1251(a). The issue in this case is whether the Court should exercise original jurisdiction over a suit brought by the States of Alabama,

Florida, and Tennessee, the Commonwealth of Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission (Southeast Commission), against the State of North Carolina, seeking a remedy for North Carolina's alleged breach of the Southeast Interstate Low-Level Radioactive Waste Management Compact (Southeast Compact) (reproduced at Br. in Opp. App. 5a-26a). That Compact was authorized by Congress in 1986 through the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, § 223, 99 Stat. 1872 (Compact Consent Act).

1. The Compact Clause of the Constitution provides that "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State." U.S. Const. Art. 1, § 10, Cl. 3. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978). Congress has enacted legislation authorizing the States to enter into regional interstate compacts to address the disposal of low-level radioactive waste. See Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859. The Southeast Compact, one of several such interstate compacts, is an agreement originally among the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Southeast Compact, Art. 7(A), 99 Stat. 1878; Br. in Opp. App. 21a. Each State enacted legislation enabling it to enter into the Compact. *E.g.*, N.C. Gen. Stat. § 104F-1 (1998) (repealed July 22, 1999).

The States entered into the Southeast Compact for the purpose of, *inter alia*, creating "the instrument and framework for a cooperative effort" to "provide sufficient facilities for the proper management of low-level radioactive waste generated in the region." See Southeast Compact, Art. 1, 99 Stat. 1872; Br. in Opp.

App. 6a. Under the Compact, a pre-existing facility in Barnwell County, South Carolina, would initially provide for the disposal of the region's low-level radioactive waste, but the Compact provided that "in no event shall this disposal facility serve as a regional facility beyond December 31, 1992." See Southeast Compact, Art. 2(10), 99 Stat. 1873; Br. in Opp. App. 8a. The Compact provided that the Southeast Commission would develop and adopt procedures and criteria for selecting one of the compacting States as the host State for the next regional facility. Southeast Compact, Art. 4(E)(6), 99 Stat. 1875; Br. in Opp. App. 12a-13a.

The Southeast Commission consists of two representatives of each member State, each of whom is entitled to one vote. Southeast Compact, Art. 4(A) and (B), 99 Stat. 1874; Br. in Opp. App. 11a. Upon becoming a party to the Southeast Compact, each member State was required to pay $25,000 to the Commission for use in covering the Commission's costs. Southeast Compact, Art. 4(H)(1), 99 Stat. 1876; Br. in Opp. App. 15a. In addition, the Compact requires each State hosting a regional waste disposal facility to levy "special fees or surcharges on all users of such facility" to be paid to the Commission to the extent required to cover its annual budget. Southeast Compact, Art. 4(H)(2), 99 Stat. 1876; Br. in Opp. App. 15a-16a.

The Southeast Compact confers on the Commission various administrative duties and powers. Southeast Compact, Art. 4(E), 99 Stat. 1874-1875; Br. in Opp. App. 11a-14a. Those powers include the authority to impose sanctions against any party State that fails to comply with the Compact's provisions or to fulfill the obligations incurred by becoming a party to the Compact. Southeast Compact, Art. 7(F), 99 Stat. 1879; Br. in Opp. App. 23a. The Compact specifically provides:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state.

Ibid. Sanctions may be imposed "only upon the affirmative vote of at least two-thirds of the Commission members." *Ibid.*

2. The present controversy arises from the Southeast Commission's decision to sanction the State of North Carolina for what the Commission found to be North Carolina's failure to comply with its Compact obligations. In 1986, the Commission chose North Carolina as the host State for a regional waste disposal facility. See Mot. for Leave to File Bill of Complaint 7 (Mot.). To assist in developing the facility, the Commission appropriated money from its annual budget for a trust fund for North Carolina's use in creating the facility. Mot. 9; Br. in Opp. 4-5. The Commission also adopted a Capacity Assurance Charge on waste sent to the Barnwell County, South Carolina, facility "[t]o assure the timely development of the second regional disposal facility in North Carolina." Mot. 8-9 (quoting Mot. App. 39a); Br. in Opp. 5. In 1990, however, North Carolina notified the Commission that it could not meet the January 1, 1993, target date for completion of the facility. See Mot. 9. The Commission nonetheless continued to help fund the development of the facility through additional fees, including a Regional Access Fee and an Out-of-Region Access Fee, charged on waste sent to the Barnwell County facility. See Mot. 9-10.

In December 1994, North Carolina informed the Southeast Commission that the opening of the new facility would be postponed until 1998. Mot. 10. In 1995, South Carolina withdrew from the Compact after the Commission rejected that State's proposal to extend the operation of the Barnwell County facility for all of the member States, but deny access to North Carolina until North Carolina issued a license for the new facility. *Id.* at 11. After South Carolina's withdrawal, the Commission informed North Carolina that additional Commission funding would be unavailable, because the Commission could no longer obtain fees from the Barnwell County site. See *id.* at 11-12. In June 1996, North Carolina notified the Commission that it could not continue developing the second facility without further funding from the Commission. *Id.* at 12-13. The Commission and North Carolina engaged in further discussions regarding the funding issue, but were unable to resolve their differences. See *id.* at 13-16.

On June 21, 1999, the Florida and Tennessee representatives requested that the Southeast Commission sanction North Carolina. Mot. 16. The sanctions complaint alleged that, by failing to provide the second disposal facility for the region, North Carolina had failed to fulfill its obligations as a member State under the Southeast Compact. *Ibid.* The complaint sought, *inter alia*, the return of nearly $80 million in funding that the Commission had provided to North Carolina to assist in developing the facility. *Ibid.*

On July 26, 1999, North Carolina withdrew from the Southeast Compact, alleging that the Commission had violated the Compact by cutting off supplemental funding of the facility and stating that it "had no option but to" withdraw. See Mot. 17 (quoting Mot. App. 133a).

In November 1999, the Commission sent North Carolina notice of a hearing on the sanctions complaint. *Ibid.* The hearing was held in December 1999, but North Carolina did not participate. *Id.* at 17-18. North Carolina asserted that the Commission lacked jurisdiction to hold the sanctions hearing because North Carolina had voluntarily withdrawn from the Compact. Br. in Opp. 10-11.

After the hearing, the Commission unanimously found that North Carolina had violated the Southeast Compact. Mot. 18. It ordered North Carolina to repay $79,930,337 to the Commission in addition to interest accruing from January 1, 1998, the date when North Carolina stopped its work on the second facility. *Ibid.* The Commission also ordered North Carolina to pay the Commission's attorney's fees and $10 million for the loss of revenue that the Commission would have received from the second facility. *Ibid.* The Commission directed North Carolina to comply with the sanctions order by July 10, 2000. *Ibid.* North Carolina did not comply with the order. See *ibid.*

In response, the Southeast Commission moved for leave to file a bill of complaint in this Court against North Carolina seeking enforcement of its sanctions order. See Motion for Leave to File Bill of Complaint, *Southeast Interstate Low-Level Radioactive Waste Management Commission* v. *North Carolina*, 531 U.S. 942 (2000) (No. 131, Original). The Commission invoked this Court's original jurisdiction on the ground that the Southeast Compact grants the Commission the power, upon a majority vote of its members, to "act or appear on behalf of any party state or states," as "an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has juris-

diction over the management of wastes." Southeast Compact, Art. 4(E)(10), 99 Stat. 1875; Br. in Opp. App. 14a. The Court invited the Solicitor General to express the views of the United States. See 531 U.S. 942 (2000).

The United States, as amicus curiae, urged the Court to deny the Southeast Commission's motion for leave to file a bill of complaint because the proposed suit did not fall within the Court's exclusive original jurisdiction over "all controversies between two or more States." 28 U.S.C. 1251(a). U.S. Amicus Br., *Southeast Interstate Low-Level Radioactive Waste Management Commission* v. *North Carolina*, 533 U.S. 926 (2001) (No. 131, Original) (reproduced at Mot. App. 1a-23a). The United States observed that the Commission is not itself a State for purposes of this Court's original jurisdiction, that it was questionable whether Congress could authorize the Commission to file suit in the place of a State, and that, in any event, there was no persuasive reason to believe that Congress had intended that the Commission could invoke this Court's exclusive original jurisdiction under 28 U.S.C. 1251(a). U.S. Amicus Br. 6-17 (Mot. App. 11a-22a). This Court subsequently denied the Commission's motion for leave to file a bill of complaint. 533 U.S. 926 (2001).

Four of the compacting States, together with the Southeast Commission, have now invoked this Court's original jurisdiction, seeking a remedy for North Carolina's alleged breach of the Southeast Compact. They specifically seek a determination whether (1) the Southeast Commission acted within its power under Article 4(F) of the Compact in issuing a sanctions order requiring North Carolina to disgorge the $79,930,337 that the Commission had provided that State to license and develop the regional disposal facility that never materialized; and (2) North Carolina must comply with the

Southeast Commission's sanctions order. Mot. 20. North Carolina opposes the motion, arguing that this Court lacks jurisdiction because the suit does not differ substantially, apart from addition of the States as "nominal parties," from the Southeast Commission's previous proposed suit. Br. in Opp. 12-15. North Carolina additionally argues that the nature of this case does not warrant the Court's exercise of its original jurisdiction, *id.* at 16-20, that alternative fora are available, *id.* at 21-24, and that, in any event, North Carolina did not breach its obligations under the Compact, *id.* at 24-28.

DISCUSSION

The movants properly invoke the original jurisdiction of this Court to resolve a significant interstate controversy. The Court should grant the motion for leave to file a bill of complaint and direct North Carolina to answer. Because the complaint, at the threshold, presents issues of law that could dispose of the case and would in any event determine the direction of future proceedings, the Court may wish to consider entertaining motions for partial summary judgment before referring this case to a special master.

1. The Complaint Presents Claims That Warrant The Exercise Of This Court's Original Jurisdiction

This Court has original and exclusive jurisdiction over a judicial case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767 (1998); *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907).

Nevertheless, the Court has determined that its exercise of original jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)); see *Nebraska* v. *Wyoming*, 515, U.S. 1, 8 (1995); *Texas* v. *New Mexico*, 462 U.S. at 570. In deciding whether to grant leave to file a complaint in a dispute arising under the Court's exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (internal quotations and citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Measured against those standards, the complaint presents a matter warranting the Court's exercise of its original jurisdiction.

a. The Southeast Compact constitutes an interstate agreement among sovereign States that creates rights and obligations enforceable in this Court. The moving States, joined by the Southeast Commission, allege that North Carolina has breached its obligations under that agreement and has failed to submit to the agreement's prescribed remedial mechanisms. Those allegations give rise to a "controvers[y] between two or more States" within the reach of this Court's "original and exclusive jurisdiction." 28 U.S.C. 1251(a).

North Carolina contends that the complaint falls outside this Court's exclusive original jurisdiction because the moving States are not the "real parties in interest," but rather are "nominal" parties that represent the interests of the Southeast Commission, which cannot itself invoke this Court's original jurisdiction. Br. in Opp. 12-15. The United States agrees that the Southeast Commission cannot, by itself, invoke this Court's

exclusive jurisdiction for the reasons set out in the United States' brief amicus curiae in *Southeast Interstate Low-Level Radioactive Waste Management Commission* v. *North Carolina*, 533 U.S. 926 (2001) (No. 131, Original) (reproduced at Mot. App. 1a-23a). The United States disagrees, however, with North Carolina's characterization of the respective roles of the moving States and the Southeast Commission in this case.

In No. 131, Original, the Southeast Commission was the sole plaintiff in the proposed complaint. The United States pointed out that the Southeast Commission is plainly not a State of the Union and therefore itself lacked the power to invoke this Court's exclusive original jurisdiction. Mot. App. 12a-16a. Furthermore, the United States argued that the Southeast Commission could not invoke this Court's exclusive original jurisdiction as a representative of States that are parties to the Southeast Compact. *Id.* at 17a-20a. The Southeast Commission's inability to invoke this Court's original jurisdiction does not, however, prevent the compacting States themselves from doing so. As the United States explained in its amicus brief in No. 131, Original, "[t]he Court's rejection of original jurisdiction over a suit by the Commission would not, however, preclude one or more States that are parties to the Compact from bringing an original action under 28 U.S.C. 1251(a) against another party State to enforce the Compact and seek an appropriate remedy." *Id.* at 21a. The moving States have sought leave to file a bill of complaint on that very basis. See Mot. 1-2.

Contrary to North Carolina's assertions, the moving States have not invoked this Court's original jurisdiction "to forward the claims of individual citizens" or, more specifically, the claims of the Southeast Com-

mission. Br. in Opp. 12 (quoting *Kansas* v. *Colorado*, 533 U.S. 1, 8 (2001)). Rather, the moving States themselves have sued North Carolina, Compl. paras. 1-7, "for violation of the member States' rights under the Compact, breach of contract, unjust enrichment, promissory estoppel and money had and received." *Id.* para. 9. See *id.* paras. 62-86. The moving States are, in short, asserting their *own* rights under the Southeast Compact, claiming that they themselves "were harmed not only by the fact that they found themselves without a site within their region at which to dispose of low-level radioactive waste, but also because close to $80 million of the Commission's funds were converted by North Carolina without North Carolina fulfilling its obligations undertaken pursuant to the Compact." *Id.* para. 9. The moving States are entitled to pursue any available compact remedy for North Carolina's alleged breach of the Compact, and those States have chosen to seek declaratory relief and enforcement of the Southeast Commission's sanctions order, which imposes a sanction in the nature of a restitutionary remedy. See *id.* paras. 18-45.

North Carolina is also mistaken in asserting that the moving States' action here to recover money paid to North Carolina by the Southeast Commission is equivalent to an action in which a State "merely seek[s] recovery for the benefit of individuals who are the real parties in interest." Br. in Opp. 12 (quoting *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 396 (1938)). The moving States seek relief that would redound to their own benefit under the Compact. They ask the Court to validate their view of the Compact's sanctions provisions by declaring that (1) "North Carolina is subject to the jurisdiction of the Commission and subject to the Commission's sanctions decisions"; (2) "the Sanctions

Hearing conducted by the Commission was fair and valid"; and (3) "the sanctions against North Carolina * * * were fair and reasonable and are subject to enforcement." Compl., Prayer for Relief, paras. 1-3. If the moving States are correct that the Southeast Compact subjected North Carolina to the described sanctions regime under the facts alleged, then they are entitled, on the basis of their *own* rights under the Compact, to seek appropriate declaratory relief and enforcement of the sanctions that the Commission imposed against North Carolina. *Texas* v. *New Mexico*, 462 U.S. at 567 (This Court's jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact.").

The moving States are not disqualified from invoking this Court's jurisdiction by the Southeast Commission's presence in the lawsuit as an additional proposed plaintiff. See Br. in Opp. 13-14. The Court's exclusive original jurisdiction provides a forum for interstate disputes, and the participation of non-state parties is normally unnecessary by virtue of a State's parens patriae role in representing the interests of its citizens. See, *e.g.*, *New Jersey* v. *New York*, 345 U.S. 369, 372-373 (1953). Nevertheless, this Court has, on occasion, allowed non-state parties to participate in original actions as intervenors or amici curiae. See, *e.g.*, *Arizona* v. *California*, 373 U.S. 546, 564 (1963); see generally Robert Stern et al., *Supreme Court Practice* 571-574 (8th ed. 2002). The presence of non-state parties accordingly does not deprive the Court of jurisdiction. *Id.* at 553-554. North Carolina additionally notes that not all of the compacting States have joined this lawsuit, but North Carolina does not suggest that the absence of the other compacting States would deprive

the Court of jurisdiction in this case. Compare Br. in Opp. 15, with Reply Br. 4 n.2.

b. The moving States' claim that North Carolina has violated the Southeast Compact constitutes a substantial sovereign claim that warrants this Court's exercise of it original jurisdiction. Interstate compacts play an important role in the federal system, permitting States, with the consent of Congress, to formulate regional compromises and adjustments that might otherwise lead to interstate friction. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925). When the compacting States disagree over the meaning or application of the Compact, the States may properly invoke this Court's original jurisdiction to resolve the dispute. See, *e.g.*, *Kansas* v. *Nebraska*, 525 U.S. 1101 (1999) (Republican River Compact); *New Jersey* v. *New York*, 511 U.S. 1080 (1994) (Compact of June 28, 1834) ; *Kansas* v. *Colorado*, 475 U.S. 1079 (1986) (Arkansas River Compact); *Texas* v. *New Mexico*, 421 U.S. 927 (1975) (Pecos River Compact).

As North Carolina points out, this Court may decline to exercise jurisdiction if a dispute lacks sufficient seriousness and dignity. See *California* v. *West Virginia*, 454 U.S. 1027 (1981) (declining to exercise jurisdiction over an alleged breach of contract respecting athletic contests between two state universities). But contrary to North Carolina's assertions (Br. in Opp. 16-20), this case does not present an insubstantial dispute. Congress has determined that "the disposal of low-level radioactive waste can be most safely and effectively managed on a regional basis," Compact Consent Act, § 4, 99 Stat. 1845, and it has authorized States to enter into interstate compacts, such as the Southeast Com-

pact, "to provide for the establishment and operation of regional disposal facilities," *ibid.* The moving States allege that North Carolina has failed to fulfill its obligations under the Southeast Compact and has thereby impeded their interstate efforts to create a much-needed low-level radioactive waste disposal facility for their region. See Compl. para. 9. Those allegations raise a matter of substantial importance.

North Carolina's contention that this suit constitutes "little more than a contract dispute seeking compensatory damages" (Br. in Opp. 18) understates the seriousness of its compact obligations. A State that enters into an interstate compact has made a sovereign commitment, on behalf of its citizens, to honor legally enforceable promises to its sister States and their citizens. Indeed, even if this suit merely involved "purely monetary compensation" (*id.* at 20), the moving States' assertion that North Carolina has unlawfully retained nearly $80 million needed to prepare for a second disposal facility for low-level radioactive waste could, by itself, present a matter of sufficient gravity among the compacting States to justify this Court's exercise of its original jurisdiction. Cf. *Kansas* v. *Colorado*, 533 U.S. at 9 n.2 (noting that Kansas claimed $62 million in damages for compact violations, of which $9 million represented direct and indirect losses and $53 million reflected adjustments for inflation and interest).

c. North Carolina asserts that fora other than this Court are available to resolve this dispute. This case, however, involves a dispute among States over the meaning and application of an interstate compact, and the States have been unable to resolve their differences through consensual means. This Court, through the exercise of its original jurisdiction, presents the only realistic forum for adjudication of that interstate

dispute. As the United States explained in No. 131, Original, in some cases "state courts are appropriate fora for resolving interstate compact controversies that do not fall within this Court's exclusive original jurisdiction." Mot. App. 21a-22a (emphasis omitted). This dispute, however, falls squarely within the Court's exclusive original jurisdiction and the Court has a "serious responsibility" to resolve an interstate dispute of this magnitude. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 241 (1991); *Arizona* v. *California*, 373 U.S. 546, 564 (1963).

2. The Court May Wish To Grant The Parties Leave To File Motions For Partial Summary Judgment Before Referring This Case To A Special Master

Upon granting a motion for leave to file a complaint, the Court typically directs the defendant to file an answer and then, shortly thereafter, refers the matter to a special master to conduct appropriate proceedings. See, *e.g.*, *New Jersey* v. *New York*, 511 U.S. 1080 (1994); 513 U.S. 924 (1994); *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987); 483 U.S. 1002 (1987). In appropriate situations, however, this Court has considered or resolved preliminary or controlling legal issues before, or in lieu of, referring the case to a master. See, *e.g.*, *New Hampshire* v. *Maine*, 530 U.S. 1272 (2000); 531 U.S. 1066 (2001); 532 U.S. 742 (2001); *Kansas* v. *Nebraska*, 525 U.S. 805, 1101 (1999); 528 U.S. 1001 (1999); 530 U.S. 1272 (2000); *United States* v. *Alaska*, 499 U.S. 946 (1991); 501 U.S. 1248, 1275 (1991); 503 U.S. 569 (1992). We suggest that this controversy presents a situation in which the latter course may be advisable.

The moving States and North Carolina fundamentally disagree on two basic interpretive issues respecting the Southeast Compact: (1) whether the Compact

empowers the Southeast Commission to impose, as a sanction for North Carolina's failure to construct a waste facility, a requirement that North Carolina return funds that the Commission provided in preparation for construction of that facility; and (2) whether the Compact divested the Commission of authority to impose that sanction when North Carolina withdrew from the Compact before the Commission completed the sanctions process. Compare Mot. 20 and Reply Br. 9-10, with Br. in Opp. 24-28. Because resolution of those threshold issues could dispose of the case and would in any event focus the dispute and determine the course of future proceedings, the Court may wish to consider addressing those matters before referring the case to a special master.

This Court has broad authority to structure proceedings under its original jurisdiction to promote the fair and efficient resolution of an interstate dispute. See *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 491-494 (1854). The Court may "mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred." *Id.* at 492. As a general matter, this Court employs the Federal Rules of Civil Procedure as a guide to the Court's proceedings. See Sup. Ct. R. 17.2. In this case, the Court may wish to adapt the summary judgment procedures, set out in Federal Rule 56, to this case in order to facilitate the disposition of the action. Rule 56 provides that, after commencement of the action, a party seeking to recover upon a claim may move for "a summary judgment in the party's favor upon all or any part thereof." Fed. R. Civ. P. 56(a).

In this instance, the initial issues noted above, respecting the Commission's authority vel non to impose sanctions, present pure questions of law, and the

historic facts that form the background for those questions appear undisputed. We accordingly expect that the parties would be able to agree on a stipulated record for the purpose of resolving those threshold questions through cross-motions for partial summary judgment. The Court successfully employed that procedure in *United States* v. *Alaska*, *supra*. Following the Court's grant of the United States' motion for leave to file a bill of complaint and the filing of an answer, 499 U.S. at 946, the Court invited the parties to file a stipulation of facts and cross-motions for summary judgment, 501 U.S. at 1248, 1275. The Court then resolved the dispute through summary judgment, without the need for appointment of a special master. 503 U.S. at 569. Cf. *New Hampshire* v. *Maine*, 532 U.S. at 756 (resolving an original action, without the need for appointment of a special master, through a motion to dismiss).

Under the envisioned procedure, the Court would retain the power to resolve the motions for partial summary judgment itself and then, if its resolution of those motions does not dispose of the case, commit any future proceedings to a special master. Alternatively, the Court would retain the option of referring those motions to a special master for a recommended decision if the Court concluded, upon inspection of the motions, that circumstances so warranted. See *Kansas* v. *Nebraska*, 525 U.S. at 1101 (inviting motion to dismiss); 528 U.S. at 1001 (appointing special master and referring to him the motion to dismiss). In either event, the provision of a mechanism for resolving the threshold legal questions is likely to focus the litigation on two controlling issues and facilitate the ultimate resolution of the controversy.

The United States accordingly urges that the Court grant the moving States' motion for leave to file a complaint and direct North Carolina to answer. Following the filing of North Carolina's answer, the Court may wish to invite the parties to file cross-motions for partial summary judgment, supported by a stipulation of facts, limited to two questions: (1) Whether the Southeast Compact empowers the Southeast Commission to impose, as a sanction for a State's failure to construct a low-level radioactive waste facility, a requirement that the State return funds that the Commission provided in preparation for construction of that facility; and (2) Whether the Southeast Compact divests the Southeast Commission of authority to impose that sanction if the State withdraws from the Compact before the Commission completes the sanctions process.

CONCLUSION

The motion for leave to file a bill of complaint should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

PATRICIA WEISS
Attorney

APRIL 2003

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Supreme Court, U.S.
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No. 132, ORIGINAL

IN THE
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

SUPPLEMENTAL BRIEF OF PLAINTIFFS

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
COLLEEN M. LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for Plaintiffs

* Counsel of Record
[Additional Counsel Listed on Inside Cover]

April 30, 2003

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BILL PRYOR
ATTORNEY GENERAL
Office of the Attorney General
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

PAUL G. SUMMERS
ATTORNEY GENERAL
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

JON GLOGAU
ATTORNEY GENERAL
Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 487-1963

JERRY W. KILGORE
ATTORNEY GENERAL
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Attorneys for Plaintiffs

SUPPLEMENTAL BRIEF OF PLAINTIFFS

In its *amicus* brief, the United States agrees that "[t]he movants properly invoke the original jurisdiction of this Court to resolve a significant interstate controversy" and that "[t]he Court should grant the motion for leave to file a bill of complaint and direct North Carolina to answer." U.S. Brief 8 (filed April 2003). Plaintiffs are in complete accord with the analysis at pages 1-15 of the United States' brief.

Plaintiffs file this supplemental brief to endorse the United States' proposal that the Court grant the parties leave to file cross-motions for summary judgment on specified legal issues prior to referring this case to a Special Master. *Id.* at 15-18. Plaintiffs agree that "the historic facts that form the background" for the legal issues stated by the United States are "undisputed," and that the parties should "be able to agree on a stipulated record for the purpose of resolving those threshold questions." *Id.* at 16-17. Once North Carolina files its answer, plaintiffs will make every good faith effort to reach agreement with North Carolina on a stipulation of undisputed facts. Plaintiffs further agree that the issues stated by the United States, "respecting the Commission's authority vel non to impose sanctions, present pure questions of law," *id.* at 16, that will resolve or effectively direct this action, and are therefore appropriate for this Court's threshold resolution.

CONCLUSION

The motion for leave to file a bill of complaint should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
COLLEEN M. LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

BILL PRYOR
ATTORNEY GENERAL
Office of the Attorney General
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

JON GLOGAU
ATTORNEY GENERAL
Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 487-1963

PAUL G. SUMMERS
ATTORNEY GENERAL
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

JERRY W. KILGORE
ATTORNEY GENERAL
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Attorneys for Plaintiffs

April 30, 2003

* Counsel of Record

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STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA,
AND THE SOUTHEAST INTERSTATE LOW-LEVEL
RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion For Leave To File Bill Of Complaint

SUPPLEMENTAL BRIEF OF THE STATE OF NORTH CAROLINA IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

ROY COOPER
North Carolina Attorney General

Grayson G. Kelley,* Senior Deputy Attorney General
John F. Maddrey, Special Deputy Attorney General
Jennie Wilhelm Mau, Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

May 1, 2003

**Counsel of Record*

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SUPPLEMENTAL BRIEF OF THE STATE OF NORTH CAROLINA IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

The prior effort of the Southeast Interstate Low-Level Radioactive Waste Management Commission (the Commission) to invoke this Court's original jurisdiction in an attempt to enforce a monetary sanction against the State of North Carolina was rejected (Docket No. 131, Original). Now, the Solicitor General, in a reversal of position, advocates the use of the Court's original jurisdiction to allow four of the Commission's six member States, in conjunction with the Commission–a separate and independent legal entity–to pursue enforcement of a monetary claim on behalf of the Commission against the State of North Carolina, under the guise of an action to declare rights arising from an interstate compact. Extending this Court's original jurisdiction to include actions brought by a State for the benefit of a compact commission does not comport with established precepts limiting the exercise of original jurisdiction to cases that implicate important concerns of federalism and those involving the core sovereign interests of two or more States. The Solicitor General's view that the Court should accept the case under its original jurisdiction fails to suggest more than a minimal presence of legal or policy issues affecting the United States or the sovereign interests of the States. Acceptance of the case would therefore be inconsistent with Chief Justice Rehnquist's prudent suggestion that the Court restrict its acceptance of suits between States to those involving issues of state sovereignty: "Our original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State, but

rather should be limited to complaints by States *qua* States." *Maryland v. Louisiana*, 451 U.S. 725, 766 (1981) (Rehnquist, J. (now C.J.), dissenting).

Contrary to the Solicitor General's view, the Commission's claim for restitution does not implicate the direct interests of the member States. As detailed in the Brief in Opposition, the petitioners readily admit that the money at issue was raised exclusively by levying fees and surcharges on wastes disposed at the regional facility in Barnwell, South Carolina. The funds collected from nuclear waste generators and distributed to North Carolina by the Commission were never public funds of the treasuries of the party States to the Compact. Indeed, as noted by the Solicitor General in the brief filed in the prior action (which sought the identical relief requested in the refiled action):

> The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the Commission–and not the States that are parties to the Compact–dispersed the funds to North Carolina in the first place.

Brief for the United States as *Amicus Curiae* (No. 131, Original) (Pet. App. at 20a). In fact, the critical "disconnect" between the member States to the Compact and the relief being sought was trumpeted by the Commission as a reason for allowing it to proceed directly against North Carolina in the prior action:

> Although any of the member States could seek a declaratory judgment from this Court that North Carolina violated the terms of the Compact, only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it.

Supplemental Brief in Response to the Brief of the Solicitor General (No. 131, Original) at 5-6. The Commission further conceded that no member "State would incur the substantial expense of bringing a lawsuit seeking a declaration that North Carolina violated the Compact when there is no significant monetary recovery available to that State from this Court." *Id.* at 7-8. In spite of these admissions in the Commission's prior unsuccessful attempt to invoke this Court's original jurisdiction, the Solicitor General's view has now changed and accepts the petitioners' assertion that the States' indirect interest in the Commission's monetary sanction is an appropriate basis for the exercise of this Court's original jurisdiction, solely as a result of the Commission's addition of four States as plaintiffs.

1. The Solicitor General's suggested expansion of the concept of original jurisdiction is not supported by citation to *Texas v. New Mexico*, 462 U.S. 554, 567 (1983), for the general proposition that such jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." That case arose from the report of a Special Master concerning water rights under the terms of the Pecos River Compact wherein the State of New Mexico contended

"that this Court may do nothing more than review official actions of the Pecos River Commission, on the deferential model of judicial review of administrative action by a federal agency." 462 U.S. at 566. The Court rejected New Mexico's contention, finding "no doubt" that its jurisdiction "extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows." 462 U.S. at 567.

In proper context, the language explicitly relied upon in two places in the Brief of the Solicitor General does not support the advocated expansion of the scope of cases appropriately within the Court's original jurisdiction. The Court was plainly addressing whether it *could* consider the exception by Texas to the report of the Special Master as a jurisdictional matter in light of New Mexico's claim that the terms of the Pecos River Compact precluded such review. This holding has no application to the circumstances presented when member States seek to pursue enforcement of a monetary sanction order on behalf of a compact commission. Indeed, the relief sought in the Bill of Complaint proposed to be brought before the Court–enforcement of monetary sanctions imposed by the Commission–is tantamount to judicial review and approval of an administrative agency's actions. The Court rejected as "untenable" New Mexico's contention that it undertake judicial review of decisions actually made by the compact commission, finding "[t]hat is not the proper function of our original jurisdiction to decide controversies between two States." 462 U.S. at 570.

2. The Solicitor General declares that "the moving States are entitled to pursue any available compact remedy for North Carolina's alleged breach," and denies that the requested enforcement of the sanctions order is equivalent to an action seeking recovery for an individual entity that is the real party in interest because "[t]he moving States seek relief that would redound to their own benefit under the Compact." Brief for the United States as *Amicus Curiae* at 11. However, the Solicitor General disregards the fundamental fact that the proposed Bill of Complaint explicitly seeks enforcement of a sanctions order that would require the State of North Carolina to pay millions of dollars to the Commission, not to the States.

If, as argued by the Solicitor General, the petitioning States are asserting their own rights under the Compact because they were individually harmed by North Carolina's failure to license and operate a regional waste facility, any such harm would not equate to the sum total of the funds provided by the Commission to North Carolina during the siting process. Rather, any damages incurred by the four named plaintiff States would require calculation of the negative impact on each State's treasury resulting from North Carolina's inability to complete the facility. The remedy sought to be enforced in the proposed Bill of Complaint, however, is measured solely on the basis of the claimed damage to the Commission from the alleged breach of the Compact agreement and in no way relates to the impact of such alleged breach on the member States, either individually or collectively. Enforcement of the monetary sanction imposed by the Commission therefore does not address the asserted harm to the individual States but

instead relates directly to restitution and lost revenue claims which are solely those of the Commission.

The Solicitor General's contention that the presence of the Commission as a non-state party does not deprive the Court of jurisdiction, Brief for the United States as *Amicus Curiae* at 12, may literally be true, but misses the point. This is not a case in which a non-state party is allowed to participate in an original jurisdiction action as an intervenor or an *amicus curiae*. Instead, the relief requested for the asserted breach of the interstate compact directly enures to the benefit of the non-state party. Fundamentally, the cause of action is being advocated on behalf of the Commission, and any monetary damages collected will be paid to the non-state party. The addition of four States as named plaintiffs does not alter these facts and does not support the Solicitor General's change of position.

3. In arguing that the proposed Bill of Complaint involves a sovereign claim of substantial importance, the Solicitor General suggests that the magnitude of the amount of money at issue "present[s] a matter of sufficient gravity among the compacting States to justify this Court's exercise of its original jurisdiction." Brief for the United States as *Amicus Curiae* at 14. The only support offered for this unique assertion is a mistaken reference to *Kansas v. Colorado*, 533 U.S. 1 (2001), where the Court recognized the "importance" of the Special Master's recommendation that prejudgment interest be included in the calculation of final damages resulting from Colorado's violations of the Arkansas River Compact. 533 U.S. at 9 n. 2. The citation offered by the Solicitor General has

no bearing on the jurisdictional issues raised by the claim of the plaintiffs. In fact, the Court had already concluded that it had proper original jurisdiction to enforce the interstate water compact by means of a recovery of money damages. Jurisdiction was appropriate because Kansas was not merely seeking recovery for the benefit of individuals who were the real parties in interest where Kansas had been in full control of the litigation since its inception and "[i]ts right to control the disposition of any recovery of damages is entirely unencumbered." 533 U.S. at 8. Here, the Commission, and not the States, has been in control of the litigation since its inception and the monetary damage recovery is explicitly sought to be paid to the Commission rather than the four States now named as additional plaintiffs. We are aware of no case in which this Court has affirmed the Solicitor General's suggestion that the amount of damages claimed can, standing alone, justify exercise of the Court's original jurisdiction. The Court's contemporary application of jurisdictional principles governing its exercise of original jurisdiction instead suggests that substantial consideration is likely to be given only to cases which "implicate[] serious and important concerns of federalism." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992).

4. To counter the availability of other forums to hear the Commission's case, the Solicitor General again reverses position and adopts the view that "[t]his Court, through the exercise of its original jurisdiction, presents the only realistic forum for adjudication" of the dispute at issue. Brief for the United States as *Amicus Curiae* at 14. The Solicitor General asserts this position while at the same time acknowledging the statement in the prior Brief for the United States that "state

courts *are* appropriate fora for resolving interstate compact controversies that do not fall within this Court's exclusive original jurisdiction." (Pet. App. at 21a-22a) The only attempt to distinguish these conflicting positions is the bare assertion that the repackaged action, with four States added as parties, "falls squarely within the Court's exclusive original jurisdiction." Brief for the United States as *Amicus Curiae* at 15. The addition of four States as plaintiffs does not diminish the availability of other forums to hear this case, and this procedural maneuver should not be accepted as a prototype for establishing the jurisdictional "square fit" suggested by the Solicitor General in future cases where alternative forums are readily available.

The circular reasoning offered by the Solicitor General is also undercut by the extensive ongoing litigation involving the Central Interstate Low-Level Radioactive Waste Compact Commission and the State of Nebraska over the proposed host state's failure to license and open a regional waste facility pursuant to the Central Interstate Compact. *See Entergy Arkansas, Inc. v. Nebraska*, 226 F. Supp. 2d 1047 (2002). The *Nebraska* case, in which the trial court awarded over $151 million to the compact commission, plainly demonstrates that a judicial forum other than this Court can adjudicate claims against a State arising from an interstate compact. Neither the forum in which the matter was tried nor the magnitude of the dollars at issue has precluded the compact commission from pursuing a judicial remedy in that case.

5. The Solicitor General urges the Court to grant the motion for leave to file a complaint and further suggests that

the Court may wish to require the parties to file cross-motions for partial summary judgment limited to two questions pertaining to the authority of the Commission to impose monetary sanctions and the enforcement of such sanctions against a State that has withdrawn from the Compact before such sanctions were imposed. With all due respect, North Carolina's legal strategy in this dispute should not be directed or restricted by the Solicitor General.

While the Solicitor General is no doubt motivated by appropriate concerns for the efficient administration of justice, the suggestion simplistically narrows the matters in dispute and ignores fundamental threshold issues that necessarily would be presented by North Carolina's Answer to the proposed Bill of Complaint. North Carolina's legal defenses to the proposed complaint and the relief requested therein would not necessarily be limited to the narrow issues drafted by the Solicitor General. Although a ruling that the monetary sanctions are not authorized by the terms of the Compact would obviously dispose of the need for further proceedings in the case, this Court should not be misled into thinking that any other answer to the questions framed by the Solicitor General would obviate the need for the development of a record establishing the extensive factual background underlying this dispute and the resolution of numerous legal issues related to North Carolina's defenses to the Commission's claims.

CONCLUSION

For the foregoing reasons, together with those stated in the Brief in Opposition, the Court should deny the motion for leave to file a Bill of Complaint.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Grayson G. Kelley*
Senior Deputy Attorney General

John F. Maddrey
Special Deputy Attorney General

Jennie Wilhelm Mau
Assistant Attorney General

May 1, 2003

**Counsel of Record*

No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

ANSWER TO BILL OF COMPLAINT

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
NORTH CAROLINA
ATTORNEY GENERAL
GRAYSON G. KELLEY*
SENIOR DEPUTY
ATTORNEY GENERAL
JOHN F. MADDREY
SPECIAL DEPUTY
ATTORNEY GENERAL
JENNIE WILHELM MAU
ASSISTANT ATTORNEY
GENERAL
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900
*Counsel of Record

Attorneys for Defendant

IN THE

Supreme Court of the United States

No. 132, Original

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

ANSWER TO BILL OF COMPLAINT

The State of North Carolina ("North Carolina"), Defendant, pursuant to the Order of this Court of June 16, 2003, for its answer to the Bill of Complaint ("Complaint") filed by the State of Alabama, the State of Florida, the State of Tennessee, the Commonwealth of Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission ("the Commission"), states:

1. North Carolina admits the averments set forth in Paragraph 1 of the Complaint.

2. North Carolina admits the averments set forth in Paragraph 2 of the Complaint on information and belief.

3. North Carolina admits the averments set forth in Paragraph 3 of the Complaint on information and belief.

4. North Carolina admits the averments set forth in Paragraph 4 of the Complaint on information and belief.

5. North Carolina admits the averments set forth in Paragraph 5 of the Complaint on information and belief.

6. North Carolina denies the averments set forth in Paragraph 6 of the Complaint for the reason that the Southeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986) ("the Compact"), speaks for itself.

7. North Carolina admits that it was a party to the Compact prior to its withdrawal on July 26, 1999. North Carolina denies all other averments set forth in Paragraph 7 of the Complaint.

8. North Carolina admits that this Court has original and exclusive jurisdiction of all controversies between two or more States. North Carolina denies that the Court has original and exclusive jurisdiction over the Commission's claim because North Carolina denies that the Commission is equivalent to a State for purposes of such jurisdiction and because North Carolina asserts its sovereign immunity from claims by the Commission.

9. North Carolina admits that North Carolina was a member of the Compact prior to its withdrawal on July 26, 1999. North Carolina admits that North Carolina was designated a host State for the development of a low-level radioactive waste disposal facility. North Carolina denies all other averments set forth in Paragraph 9 of the Complaint.

10. North Carolina admits the averments set forth in Paragraph 10 of the Complaint.

11. North Carolina admits the averments set forth in Paragraph 11 of the Complaint.

12. North Carolina denies the averments set forth in Paragraph 12 of the Complaint for the reason that the Compact speaks for itself.

13. North Carolina denies the averments set forth in Paragraph 13 of the Complaint for the reason that the Compact speaks for itself.

14. North Carolina denies the averments set forth in Paragraph 14 of the Complaint for the reason that the Compact speaks for itself.

15. North Carolina denies the averments set forth in Paragraph 15 of the Complaint for the reason that the Compact speaks for itself.

16. North Carolina denies the averments set forth in Paragraph 16 of the Complaint for the reason that the Compact speaks for itself.

17. North Carolina denies the averments set forth in Paragraph 17 of the Complaint for the reason that the Compact speaks for itself.

18. North Carolina admits that it was designated by the Commission as the second host State in September 1986. North Carolina denies all other averments set forth in Paragraph 18 of the Complaint.

19. North Carolina admits that its General Assembly created the North Carolina Low-Level Radioactive Waste Management Authority ("the Authority") by virtue of its enactment of Chapter 850 of the 1987 Session Laws on August 14, 1987. Chapter 850 of the 1987 Session Laws expressly conditioned North Carolina's continued membership in the Compact upon the enactment of legislation before December 31, 1988 by every party State specifically amending the Compact agreement concerning the right of a party State to withdraw, and by Congress consenting to this amendment before December 31, 1992. North Carolina denies all other averments set forth in Paragraph 19 of the Complaint for the reason that Chapter 850 of the 1987 Session Laws speaks for itself.

20. North Carolina admits that the Commission adopted a resolution on February 9, 1988, creating a "State Assistance Trust Fund" to provide financial assistance to any State designated as the next host State. North Carolina denies all other averments set forth in Paragraph 20 of the Complaint for the reason that the Commission's Resolution speaks for itself.

21. North Carolina admits the averments set forth in Paragraph 21 of the Complaint upon information and belief.

22. North Carolina admits that in October 1989, upon the recommendation of its Finance Committee, the Commission adopted a "Capacity Assurance Charge" on all current southeastern generators using the Barnwell, South Carolina disposal facility ("the Barnwell facility") to provide funding to support the licensing phase of the proposed North Carolina site. North Carolina denies all other averments set forth in Paragraph 22 of the Complaint.

23. North Carolina admits that in July 1990 the Authority adopted a revised work plan prepared by Chem-Nuclear Systems, Inc. (CNSI), the current operator of the Barnwell facility and the Authority's contractor for the North Carolina facility, that the plan included a revised estimated completion date for and cost of the project, and that the Commission was notified of these revised estimates at its meeting on August 23, 1990. North Carolina denies all other averments set forth in Paragraph 23 of the Complaint.

24. North Carolina admits that in November 1990, upon the recommendation of its Finance Committee, the Commission established an "Access Fee" collected from generators based upon the proportional volumes of waste originating in each of the member States to be disposed at the Barnwell facility. North Carolina denies all other averments set forth in Paragraph 24 of the Complaint.

25. North Carolina admits that the Authority notified the Commission in October 1991 of a revised estimated completion date for the project. North Carolina denies all other averments set forth in Paragraph 24 of the Complaint.

26. North Carolina admits that in June 1992 the South Carolina Legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996. North Carolina denies all other averments set forth in Paragraph 26 of the Complaint.

27. North Carolina admits that in September 1992, upon the recommendation of its Finance Committee, the Commission adopted an access fee to be charged to the generators of out-of-region waste to be disposed at the Barnwell facility ("Import Fee" or "Out-of-Region Access Fee"). North Carolina denies all other averments set forth in Paragraph 27 of the Complaint.

28. North Carolina admits that in November 1992, upon the recommendation of its Finance Committee, the Commission established an access fee to be levied on all low-level radioactive waste generators located in the States belonging to the Compact. North Carolina denies all other averments set forth in Paragraph 28 of the Complaint.

29. North Carolina admits that in April 1994 the Commission granted the Authority's request for advancement of funds from the Regional Access Fee to be paid out of the Compact's share of the Out-of-Region Access Fee collected from generators of out-of-region waste disposed at the Barnwell facility. North Carolina denies all other averments set forth in Paragraph 29 of the Complaint.

30. North Carolina admits the allegations of Paragraph 30 of the Complaint.

31. North Carolina admits that the Commission received information at its meeting on August 26, 1994 indicating an increase in the estimated time required for Division

of Radiation Protection of the North Carolina Department of Environment, Health and Natural Resources ("DRP") to review the license application for the North Carolina disposal facility submitted in December 1993 by CNSI. North Carolina further admits that at its meeting on November 16, 1994 the Commission was presented information indicating that DRP had submitted 594 interrogatories to CNSI in an attempt to obtain analyses necessary to assure protection of public health and safety and the environment. North Carolina denies all other averments set forth in Paragraph 31 of the Complaint.

32. North Carolina admits that in December 1994 the Authority approved an additional one-year extension for the licensing process. North Carolina denies all other averments set forth in Paragraph 32 of the Complaint.

33. North Carolina admits that the Commission met twice in May 1995 to consider two separate motions proposed by South Carolina to sanction North Carolina by excluding waste generated in North Carolina from disposal at the Barnwell facility until such time as North Carolina issued a license for a new facility. North Carolina denies all other averments set forth in Paragraph 33 of the Complaint.

34. North Carolina admits the allegations of Paragraph 34 of the Complaint.

35. North Carolina admits that South Carolina's withdrawal from the Compact eliminated the Commission's ability to levy fees and surcharges on waste disposed at the Barnwell facility. North Carolina denies all other averments set forth in Paragraph 35 of the Complaint.

36. North Carolina admits that in January 1996 the Chairman of the Commission advised that at some point in the future Commission funds would no longer be available to North Carolina for site development expenses. North Caro-

lina denies all other averments set forth in Paragraph 36 of the Complaint.

37. North Carolina admits that in June 1996 Governor James B. Hunt, Jr. informed the Commission that North Carolina was not prepared to assume a greater portion of the project costs and that the licensing effort would not be able to proceed if the Commission was not willing or able to continue funding. North Carolina denies all other averments set forth in Paragraph 37 of the Complaint.

38. North Carolina admits that the Commission received a report at its meeting on June 18, 1996 which indicated that the Authority had adopted a Licensing Work Plan further extending the time for review of the license application and requiring additional field work to address lingering concerns over adequate protection for public health and safety and the environment, including proper site configuration, infiltration, and drainage. North Carolina denies all other averments set forth in Paragraph 38 of the Complaint.

39. North Carolina admits that in October 1996 the Commission authorized the release of funds to the Authority to cover amounts expended by the Authority in performing the work described in the Licensing Work Plan dated May 31, 1996. North Carolina denies all other averments set forth in Paragraph 39 of the Complaint.

40. North Carolina admits that in April 1997, upon the recommendation of its Monitoring Committee, the Commission voted to release additional funds in the amount of $2.9 Million to the Authority.

41. North Carolina admits that in July 1997, upon the motion of its Vice-Chairman, the Commission voted to approve additional funding to the Authority for the months of August and September of up to $1.4 Million.

42. North Carolina admits that in August 1997, upon the recommendation of its Monitoring Committee, the Commis-

sion authorized additional stop gap funding to the Authority through November 30, 1997 of up to $1.2 Million.

43. North Carolina admits that in 1997 the Commission organized a Task Force For Facility Funding comprised of volunteer representatives of the Authority, the Commission, waste generators, and the public. North Carolina denies all other averments set forth in Paragraph 43 of the Complaint.

44. North Carolina admits that in August 1997 the Commission submitted a draft Memorandum of Understanding prepared by the Southeast Compact Electric Utilities Generators Group ("the Generators Group") which proposed that participating generators would loan funds to the Authority for use in the site development and licensing process, and that in November 1997 the Commission informed North Carolina that if North Carolina had not reached an agreement in principle with the Generators Group by December 1, 1997 the Commission would not be able to continue funding the Authority's site development activities beyond November 30, 1997. North Carolina denies all other averments set forth in Paragraph 44 of the Complaint.

45. North Carolina admits that in a letter dated December 19, 1997 the Chairman of the Authority indicated that, because the Commission and the other member States had failed to honor their commitments under the Compact and made further performance by the Authority impossible, the Authority had determined that it had no alternative but to commence the orderly shutdown of the disposal facility project pending the Commission's reversal of its funding position or the receipt of other instructions from the North Carolina Legislature. North Carolina denies all other averments set forth in Paragraph 45 of the Complaint.

46. North Carolina admits that in January 1998 the Commission notified the Authority of its position that the project shut down constituted "a breach of contract law . . .

by North Carolina." North Carolina denies all other averments set forth in Paragraph 46 of the Complaint.

47. North Carolina admits that it engaged in informal "mediation" with the Commission but that no resolution to the funding impasse between the Commission and the Authority was reached during the period between January 1998 and April 1999. North Carolina denies all other averments set forth in Paragraph 47 of the Complaint.

48. North Carolina admits that in a letter dated April 26, 1999 the Commission stated its "belief" that North Carolina was in violation of the Compact and requested that North Carolina provide a written plan and schedule for a regional disposal facility. North Carolina denies all other averments set forth in Paragraph 48 of the Complaint.

49. North Carolina admits that on June 21, 1999 the Commissioners representing the State of Florida and the State of Tennessee filed a "Sanctions Complaint" with the Commission. North Carolina denies all other averments set forth in Paragraph 49 of the Complaint for the reason that the "Sanctions Complaint" speaks for itself.

50. North Carolina admits that, consistent with the express provisions of Article VII of the Compact and North Carolina General Statute §104F-5, it withdrew from membership as a party State in the Compact as of July 26, 1999 pursuant to the enactment of Chapter 357 of the 1999 Session Laws by its General Assembly. North Carolina denies all other averments set forth in Paragraph 50 of the Complaint.

51. North Carolina admits the averments set forth in Paragraph 51 of the Complaint upon information and belief.

52. North Carolina admits that the Commission, in a letter dated November 8, 1999, gave notice of a "formal, quasi-judicial sanctions hearing" to be held by the Commission on December 8, 1999.

53. North Carolina admits that its Attorney General, in a letter dated December 1, 1999, informed the Commission that it had no authority to conduct a sanctions proceeding against a State that had voluntarily withdrawn from the Compact, that North Carolina would not participate in the sanctions proceeding, and that North Carolina would vigorously oppose any effort by the Commission to impose sanctions or retain further jurisdiction over North Carolina. North Carolina denies all other averments set forth in Paragraph 53 of the Complaint.

54. North Carolina admits, upon information and belief, that the Commission held a "Sanctions Hearing" on December 8, 1999. North Carolina denies all other averments set forth in Paragraph 54 of the Complaint.

55. North Carolina admits that, in a "Resolution" adopted December 9, 1999, the Commission purported to impose monetary sanctions against North Carolina and to require payment to the Commission of such monetary sanctions in full by July 10, 2000. North Carolina denies all other averments set forth in Paragraph 55 of the Complaint.

56. North Carolina admits that it did not comply with the terms set forth in the "Resolution" adopted by the Commission on December 9, 1999. North Carolina denies all other averments set forth in Paragraph 56 of the Complaint.

57. North Carolina admits the averments set forth in Paragraph 57 of the Complaint.

58. North Carolina admits the averments set forth in Paragraph 58 of the Complaint.

59. North Carolina admits that the "Brief for the United States as Amicus Curiae" was submitted in May 2001 in response to the order of the Court inviting the Solicitor General to express the views of the United States on the Commission's Motion for Leave to File Bill of Complaint. North Carolina denies all other averments set forth in Paragraph 59

of the Complaint for the reason that the "Brief for the United States as Amicus Curiae" speaks for itself.

60. North Carolina admits the averments set forth in Paragraph 60 of the Complaint.

61. North Carolina denies the averments set forth in Paragraph 61 of the Complaint.

COUNT I - VIOLATION OF MEMBER STATES' RIGHTS UNDER THE COMPACT

62. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 61 as though fully set forth herein.

63. North Carolina admits that the Compact is an agreement among its member States that was consented to by the United States Congress. North Carolina denies all other averments set forth in Paragraph 63 of the Complaint.

64. North Carolina admits that in 1986 it was designated as the second host State for the Compact, and promptly began taking actions necessary to site, license, construct, and operate a regional disposal facility, including the creation of necessary State agencies and the provision of funding from North Carolina's treasury. North Carolina denies all other averments set forth in Paragraph 64 of the Complaint.

65. North Carolina denies the averments set forth in Paragraph 65 of the Complaint.

COUNT II - BREACH OF CONTRACT

66. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 65 as though fully set forth herein.

67. North Carolina admits that the Compact is an agreement among its member States that was consented to by the United States Congress. North Carolina denies all other averments set forth in Paragraph 67 of the Complaint.

68. North Carolina denies the averments set forth in Paragraph 68 of the Complaint for the reason that the Compact speaks for itself.

69. North Carolina denies the averments set forth in Paragraph 69 of the Complaint.

70. North Carolina denies the averments set forth in Paragraph 70 of the Complaint.

COUNT III - UNJUST ENRICHMENT

71. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 70 as though fully set forth herein.

72. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accord with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 72 of the Complaint.

73. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accord with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 73 of the Complaint.

74. North Carolina denies the averments set forth in Paragraph 74 of the Complaint.

75. North Carolina denies the averments set forth in Paragraph 75 of the Complaint.

COUNT IV - PROMISSORY ESTOPPEL

76. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 75 as though fully set forth herein.

77. North Carolina admits that in 1986 it was designated as the second host State for the Compact, and promptly began taking actions necessary to site, license, construct, and operate a regional disposal facility, including the creation of necessary State agencies and the provision of funding from North Carolina's treasury. North Carolina denies all other averments set forth in Paragraph 77 of the Complaint.

78. North Carolina denies the averments set forth in Paragraph 78 of the Complaint.

79. North Carolina denies the averments set forth in Paragraph 79 of the Complaint.

80. North Carolina denies the averments set forth in Paragraph 80 of the Complaint.

COUNT V - MONEY HAD AND RECEIVED

81. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 80 as though fully set forth herein.

82. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accordance with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 82 of the Complaint.

83. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the

Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accordance with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 83 of the Complaint.

84. North Carolina admits that the Authority, upon recommendation of CNSI, selected a proposed site for the regional disposal facility, that CNSI submitted a license application to construct and operate a facility at the proposed site, that DRP began review of the license application, that due to inadequacies in the license application and the geologic complexity of the proposed site approval was delayed and much additional scientific analysis was required, and that the entire process stopped prior to completion of the disposal facility when the Commission refused to authorize additional funding. North Carolina denies all other averments set forth in Paragraph 84 of the Complaint.

85. North Carolina denies the averments set forth in Paragraph 85 of the Complaint.

86. North Carolina denies the averments set forth in Paragraph 86 of the Complaint.

87. North Carolina denies any and all averments set forth in any unnumbered paragraph in the Complaint as well as any and all averments set forth in the Prayer for Relief in the Complaint.

AFFIRMATIVE DEFENSES

88. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 87 as though fully set forth herein. North Carolina asserts separately and/or alternatively, even if inconsistent, the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

89. The Plaintiffs have failed to state a claim upon which relief can be granted because North Carolina's withdrawal from the Compact terminated North Carolina's obligations and divested the Commission of jurisdiction to issue sanctions against North Carolina as it was no longer a party State.

SECOND AFFIRMATIVE DEFENSE

90. The Commission is not a proper party to this suit and its claims against North Carolina are barred by North Carolina's sovereign immunity. The enactment of the Compact contained an express reservation of North Carolina's sovereign rights; therefore, as to the Commission, the Complaint must be dismissed because North Carolina did not waive its sovereign immunity and consent to suit by the Commission by virtue of its enactment of the Compact.

THIRD AFFIRMATIVE DEFENSE

91. The Plaintiffs have failed to state a claim upon which relief may be granted because the sanctions imposed by the Commission were *ultra vires*. The sanction authority of the Commission established in the Compact pertains only to suspension or termination of the rights of a party State. The Compact does not authorize the Commission to impose monetary penalties against a party State.

FOURTH AFFIRMATIVE DEFENSE

92. The Plaintiffs have failed to state a claim upon which relief may be granted because recovery for the loss of anticipated future revenues is wholly speculative and there is no legal basis for the recovery of attorney's fees from North Carolina.

FIFTH AFFIRMATIVE DEFENSE

93. The Plaintiffs' claims are barred, in whole or in part, because all damages sought as a result of a purported breach of contract are barred by the applicable statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

94. The Plaintiffs' claims are barred, in whole or in part, by the doctrine of estoppel. Funds provided by the Commission to the Authority in furtherance of North Carolina's attempt to develop the Compact's second regional low-level radioactive waste disposal facility were not retained by North Carolina but instead were used to reimburse various third parties for work done based upon the submission of invoices that were reviewed and approved by the Commission before payment. The various third parties that received such payments are not present in this action.

SEVENTH AFFIRMATIVE DEFENSE

95. North Carolina had an explicit right under the Compact to "regulate and license" any low-level radioactive waste disposal facility to be sited within its borders without interference from the Commission or any party State. North Carolina's inability to issue a license for construction and operation of the regional disposal facility did not breach any duty owed to the party States where the applicant had not yet demonstrated that the facility could be operated at the proposed site without negative impacts on public health and safety and the environment.

EIGHTH AFFIRMATIVE DEFENSE

96. The funds provided to North Carolina were collected solely from the generators of waste disposed at the Barnwell facility; therefore, the money belongs neither to the Commission nor to the Plaintiff States. To allow them to recover the money would result in unjust enrichment of the Plaintiffs.

NINTH AFFIRMATIVE DEFENSE

97. The Plaintiffs have failed to state a claim upon which relief can be granted because neither the statutes nor the common law of North Carolina recognizes a claim for "money had and received."

TENTH AFFIRMATIVE DEFENSE

98. If the Court determines that North Carolina's failure to provide a regional disposal facility breached North Carolina's agreement with the Plaintiff States, North Carolina alleges that there was "frustration of purpose" of the agreement. North Carolina's duty to perform was discharged because, after the formation of the agreement and North Carolina's designation as the second host State, South Carolina withdrew from the Compact and continued operating the Barnwell facility, frustrating the shared expectation of all party States that the regional disposal facility in the second host State would operate as a monopoly and depriving North Carolina of the guaranteed waste stream necessary to operate the facility, thereby destroying the value of the agreement.

ELEVENTH AFFIRMATIVE DEFENSE

99. North Carolina was required by statute to withdraw from the Compact if it determined that any member State was not acting in good faith in complying with all of the terms of the Compact. South Carolina's withdrawal from the Compact and continued operation of the Barnwell facility outside of the Compact for the benefit of generators nationwide while excluding waste from generators located in North Carolina and the complicity of the Commission and the other party States in failing to challenge South Carolina's conduct as a violation of the Compact demonstrated that the member States were not acting in good faith to comply with all the terms of the Compact, thereby requiring North Carolina to withdraw.

TWELFTH AFFIRMATIVE DEFENSE

100. Plaintiffs' claims are barred, in whole or in part, by the "reserved powers" doctrine, which provides that a State Legislature may not contract away the police power of the State. Regulation of the health and safety of North Carolina's residents and protection of the environment are core police power functions. The determination of North Carolina's agencies responsible for the environment and for health and safety constitute executions of police power for which North Carolina cannot be held liable.

PRAYER FOR RELIEF

WHEREFORE, North Carolina respectfully prays that the Court:

1. Dismiss the Complaint with prejudice; and

2. Grant such costs and expenses to North Carolina as allowed by law or as the Court deems just and proper.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
NORTH CAROLINA
ATTORNEY GENERAL
GRAYSON G. KELLEY*
SPECIAL DEPUTY
ATTORNEY GENERAL
JOHN F. MADDREY
SPECIAL DEPUTY
ATTORNEYS GENERAL
JENNIE WILHELM MAU
ASSISTANT ATTORNEY
GENERAL
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900
*Counsel of Record

Attorneys for Defendant

August 15, 2003

AUG 15

(13)

No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

MOTION TO DISMISS CLAIMS OF SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
NORTH CAROLINA
ATTORNEY GENERAL
GRAYSON G. KELLEY*
SENIOR DEPUTY
ATTORNEY GENERAL
JOHN F. MADDREY
SPECIAL DEPUTY
ATTORNEY GENERAL
JENNIE WILHELM MAU
ASSISTANT ATTORNEY
GENERAL
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900
*Counsel of Record

Attorneys for Defendant

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MOTION TO DISMISS CLAIMS OF SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION

Defendant State of North Carolina hereby moves to dismiss the claims of plaintiff Southeast Interstate Low-Level Radioactive Waste Commission ("Commission") for lack of jurisdiction and for failure to state a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(1), 12(b)(6), for the reasons stated herein. As elaborated below, the claims of the Commission against North Carolina – including but not limited to the claims against the State's treasury for money damages – are barred by the Eleventh Amendment and by the principles of sovereign immunity embodied in that Amendment.

INTRODUCTION AND BACKGROUND

This is an original action against the State of North Carolina for money damages and declaratory relief. The complaint alleges that North Carolina breached the obligations of the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Compact"), an interstate compact between North Carolina and the plaintiff States of Alabama, Florida, Tennessee, and Virginia, as well as Georgia and Mississippi, neither of whom are plaintiffs in this action. The complaint does not allege that the Commission is a party to the Compact; nevertheless, the Commission itself is a named party-plaintiff.

The first time this complaint was submitted to this Court, none of the States was a named plaintiff. Instead the Commission alone moved for leave to file. In response to this Court's request for the views of the United States, the Solicitor General argued that leave should be denied because "[t]he Commission itself is plainly not a State," and "therefore cannot satisfy the fundamental prerequisite for invoking this Court's exclusive original jurisdiction." U.S. Br., No. 131, Orig., at 8. Further, the Solicitor General explained, "a

suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment." *Id.* at 13.

After receipt of the Solicitor General's brief, this Court denied leave to file. *See* Mot. for Leave to File, No. 132, Orig., at 1 ("This Court denied the initial motion after requesting and receiving from the United States an *amicus* brief that expressed the view that this Court did not have exclusive original jurisdiction over a suit filed *solely* by the Commission against a member State of the Compact."). In response, four of the States themselves, in addition to the Commission, sought leave to file the instant complaint. When this Court again requested the views of the United States, the Solicitor General urged that leave be granted, on the ground that, unlike in No. 131, Original, this time the "moving States are . . . asserting their *own* rights under the Southeast Compact." U.S. Br., No. 132, Orig., at 11. The plaintiffs responded that they were in "complete accord" with that analysis, Plaintiffs' Supp. Br., No. 132, Orig., at 1, and this Court granted leave to file.

Thus the addition of the States as plaintiffs has apparently resolved the question whether this Court has exclusive original jurisdiction over this action, but the continued inclusion of the Commission as a distinct plaintiff in this action now places squarely before this Court the question posed by the Solicitor General in No. 131, Original – *viz.*, whether a suit by a Compact Clause entity against a State is barred by the principles of sovereign immunity embodied in the Eleventh Amendment. The answer is yes. Although this Court in a handful of cases has allowed parties whose own claims would be barred to intervene as plaintiffs in actions brought by parties with viable claims – i.e., the United States or sister States – those precedents do not control here for several reasons. Accordingly, the claims of the Commission should be dismissed.

ARGUMENT

The Eleventh Amendment applies to original actions in this Court, barring suit against an unconsenting State unless the suit is brought by a plaintiff against whom the State cannot assert sovereign immunity. *See Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). Although the Eleventh Amendment by its own terms bars only suits against States by citizens other States, it is by now settled that "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 736 (1999). In addition to diversity suits, States are constitutionally immune from suits by foreign nations, *see Monaco*, *supra*, by federal corporations, *see Smith v. Reeves*, 178 U.S. 436 (1900), and by Indian tribes, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).[1]

This Court's precedents have recognized *only* two types of suits against which a State may not invoke constitutional immunity: a suit by the United States, *see United States v. Texas*, 143 U.S. 621 (1892), and a suit by a sister State, *see South Dakota v. North Carolina*, 192 U.S. 286 (1904). Even as to those types of suits, the general understanding is that the States actually *have* consented to suit, albeit not in the individual case, but more broadly in the plan of the Convention that underlies our constitutional structure. *See Alden*, 527 U.S. at 755 ("The States have consented . . . to some

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[1] Even if one regards the immunity recognized in these decisions as only a common-law immunity from suit by any non-federal, non-State entity, subject to abrogation by Congress, *see, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 130-42 (1996) (Souter, J., dissenting); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 700 (1999) (Breyer, J., dissenting), that immunity would extend to suit by the Commission, because the Commission is a non-federal, non-State entity, and North Carolina's immunity from suit has not been abrogated by Congress, *see infra* note 3.

suits pursuant to the plan of the Convention or subsequent constitutional amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *Monaco*, 292 U.S. at 328 ("With respect to . . . controversies [between the States], the States by the adoption of the Constitution, acting in their highest sovereign capacity, in the convention of the people, waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established by their own consent and delegated authority as a necessary feature of the formation of a more perfect Union." (internal quotation marks omitted)).

A. North Carolina Is Immune From Suit By the Commission, Absent Abrogation Or Consent, Because The Commission Is Not The United States Or A State

While the claims brought by the individual member States may be allowed under the Constitution, North Carolina remains entitled to assert sovereign immunity from the claims asserted by the Commission itself. The Commission obviously is not the United States; it just as plainly is not a State either. That conclusion is implicit in this Court's decision to deny the Commission leave to file the complaint in No. 131, Original. In addition, this Court has twice held that a Compact Clause entity is not a State "for Eleventh Amendment purposes" when the entity sought to cloak itself in the immunity of its member States. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); *see also Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency*, 440 U.S. 391, 401-02 (1979). It is difficult to see why it should be otherwise when the entity seeks to overcome the constitutional immunity of a genuine, sovereign State.

As the Solicitor General has explained:

> The Commission itself plainly is not a State, and should not be treated as one for present purposes. . . .

> "The States, as separate sovereigns, are the constituent elements of the Union." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994). The Commission, by contrast, is an interstate body created by the Compact. The Commission exists solely for the purposes of administering the Compact.

U.S. Br., No. 131, Orig., at 8. And:

> The States may, with Congress's consent, create Compact Clause entities. But those entities "occupy a significantly different position in our federal system than do the States themselves." *Hess*, 513 U.S. at 40. Compact Clause entities lack the normal attributes of States, such as the power to enact general legislation, exercise police powers within defined borders, or organize courts of general jurisdiction.

Id. at 11.

Finally, while it is clear enough that Compact Clause entities are not normally considered to be States, it is even more clear that *this* Compact Clause entity would not be a State even were the rule to admit of some exception. The Compact itself unambiguously defines the Commission as "a legal entity *separate and distinct* from the party states" and explicitly provides that the Commission's liabilities "shall not be deemed to be liabilities of the party states." Compact, Art. 4(M)(1), Br. in Opp. App. 17a (emphasis added).

In sum, if the Commission has "no inherent right to invoke this Court's original jurisdiction in the way one of the States might do," as the United States argued (U.S. Br. 11) and as this Court evidently agreed, then it also has no inherent right to overcome North Carolina's sovereign immunity from suit "in the way one of the States might do."

B. North Carolina Has Not Waived Its Immunity From Suit By The Commission

If North Carolina is entitled to constitutional immunity from claims by the Commission itself, the Commission can proceed in this Court with its own claims against the State only if North Carolina waived its immunity from suit by the Commission. It has not.

"The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). The waiver must be "unequivocal," *id.*, evidenced either by "the most express language," *id.* at 240 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), or by litigation conduct – such as removal by the State itself to federal court – that expresses the State's acceptance of federal jurisdiction with equal "clarity," *see Lapides v. Board of Regents*, 535 U.S. 613, 620 (2002); *see generally College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 678 (1999). Neither form of waiver exists here. There certainly has been no express waiver, and at every stage of the litigation North Carolina has consistently and vigorously opposed the assertion of jurisdiction by this Court over the Commission's claims.[2]

Nor can the Commission derive any tacit waiver of immunity – much less a clear and unequivocal waiver – from

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[2] North Carolina has suggested that the State might consent to be sued in its own courts, *e.g.*, Br. in Opp. 24, but it is perfectly well settled that "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation." *College Savings Bank*, 527 U.S. at 676; *see Atascadero*, 473 U.S. at 241 ("in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court"); *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam); *Smith v. Reeves*, 178 U.S. 436, 441 (1900).

the terms of the Compact itself. Far from expressing the required "unequivocal waiver specifically applicable to federal-court jurisdiction," *Atascadero*, 473 U.S. at 241, the Compact says not one word about any member State's acquiescence to *any* suit by the Commission in *any* court, federal or otherwise. Absent a clear and unequivocal waiver of its immunity, North Carolina remains immune from suit in this Court by the Commission.[3]

C. The Commission Cannot Ride "Piggy Back" On The Claims Of The States

Finally, the Commission might try to rest its right to sue North Carolina on the argument that North Carolina may not assert immunity from suit by the Commission once other plaintiffs – the member States – have already properly invoked this Court's jurisdiction. This argument should be rejected.

The existence of plaintiff States with jurisdictionally proper claims does not strip North Carolina of its immunity from the claims of the Commission. "A federal court must examine *each claim* in a case to see if the court's jurisdiction

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[3] Even if North Carolina's immunity from suit were only a common-law immunity subject to abrogation by Congress, *see supra* note 1, there has been no abrogation of immunity here. Like a waiver, "an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987). The Compact contains no abrogation language of any kind, much less unmistakably clear abrogation language. The Compact says only that *the Commission* can appear in "any court of law," Compact, Art. IV(e)(10), Br. in Opp. App. 14a, which of course says nothing about whether any *State* may be subjected to suit in federal court. *See Welch*, *supra* (statement that "any seaman" can sue in federal court does not abrogate States' immunity from federal suit by seamen); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973) (statement that suit could be brought in "any court of competent jurisdiction" does not abrogate States' immunity from suit).

over *that claim* is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("*Pennhurst II*") (emphasis added). In *Pennhurst II*, private-party plaintiffs were seeking to establish federal jurisdiction over claims against an unconsenting State for violations of state law. The United States was also a plaintiff in the action. The private plaintiffs argued that their claims should be able to proceed despite the Eleventh Amendment because the State was not immune from the claims of the United States. The Court dismissed this argument out of hand:

> We . . . do not agree with respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court . . . the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes.

Id. at 103 n.12. Likewise, here, the presence of the "moving States" for the permissible purpose of "asserting their *own* rights under the Southeast Compact," U.S. Br., No. 132, Orig., at 11, does not eliminate North Carolina's immunity for all purposes, such that it *also* must be subjected to the distinct claim of a non-sovereign, non-State, non-elected body to $80 million (plus interest and attorney fees) from the pockets of North Carolina's residents.

It is true that the Court in the past has allowed non-State, non-federal parties to intervene as plaintiffs in original actions against nonconsenting States when the United States was already a plaintiff in the action. *See Arizona v. California*, 460 U.S. 605, 614 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). The decision to allow intervention in each case was premised on a kind of "harmless jurisdictional error" theory: once the State was already subject to the Court's subject-matter jurisdiction because of the pres-

ence of the United States, it was considered no real additional burden on the State to force it to defend against claims from which it would normally be immune. Thus the *Arizona* Court, allowing the claim of Indian tribes to proceed despite an asserted Eleventh Amendment bar, reasoned as follows:

> The Tribes do not seek to bring new claims or issues against the States, but only ask for leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore our judicial power over the controversy is not enlarged by granting leave to intervene, and the states' sovereign immunity protected by the Eleventh Amendment is not compromised.

460 U.S. at 614. The *Maryland* Court offered little by way of explanation for overriding Eleventh Amendment immunity other than a cite to *Oklahoma v. Texas*, 258 U.S. 574, 582 (1922), in which Eleventh Amendment immunity does not appear to have been asserted, and a "*cf.*" cite to a private civil case involving intervention where it would cause the defendant "relatively little additional burden," *Trbovich v. Mine Workers*, 404 U.S. 528, 536 (1972).[4]

Importantly, none of these precedents was mentioned by the Court in *Pennhurst II* when it later rejected an effort to bootstrap barred private claims onto the claims of the United

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[4] *Oklahoma* does not discuss Eleventh Amendment immunity, but in explaining why private parties in the case should be allowed to intervene in the original action, it posits a theory of "ancillary" jurisdiction that is essentially the mirror opposite of "no enlargement" theory offered in *Arizona*: whereas the *Arizona* Court assumed that the addition of otherwise-barred claims would *not* enlarge this Court's jurisdiction once the United States has already properly invoked it, the *Oklahoma* Court assumed that allowing private claims to proceed *would* enlarge the Court's jurisdiction, but that such enlargement was permissible because the new jurisdiction was "ancillary" to its original jurisdiction over the claims of the United States and of sister States. *See* 258 U.S. at 581-82.

States. Neither do they justify the Commission's similar effort to bootstrap its claims here.

First, subjecting North Carolina to the claims of the Commission would not be the same kind of "harmless jurisdictional error" involved in the earlier cases because the Commission, unlike the intervening parties in the prior decisions, is demanding relief different in quantity and quality from the relief sought by the jurisdictionally proper parties. In the pre-*Pennhurst II* cases, it appears that the intervening plaintiffs were seeking relief that did not materially differ in kind or amount from the relief already being sought by the United States. In *Arizona*, the intervening Indian tribes were already fully and adequately represented in their water rights claims by the United States acting as a fiduciary to the tribes; the Indian tribes intervened only to reiterate their rights on their own behalf. *See* 460 U.S. at 614, 627. The intervening parties in *Maryland* were pipeline companies seeking tax refunds, but it is "far from clear whether it was contemplated that the pipeline companies would be permitted to pursue their individual refund claims within the framework of the action." Wright et al., *Federal Practice & Procedure* § 4045, at 205-06 n.31 (2d ed. 1988).

Here, by contrast, it could not be more clear that the Commission seeks a form of relief substantially different from that which the States could seek on their own. As the Commission itself has carefully explained to this Court:

> Although any of the member States could seek a declaratory judgment from this Court that North Carolina violated the terms of the Compact, *only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it.*

Commission Supp. Br., No. 131, Orig., at 5-6 (emphasis added). In contrast to the relief Commission would seek, the Commission has insisted, "the States could sue *only to re-*

coup their out-of-pocket costs, a *small fraction of the total funds that North Carolina received from the Commission*, which were generated from fees levied by the Commission on users of the South Carolina waste facility." *Id.* at 6 (emphasis added); *see id.* at 7-8 (arguing that suit by a member State would not be provide an adequate remedy "because there is no significant monetary recovery available to that State from this Court"). The Solicitor General wholly agreed with that analysis:

> The Commission's sanction requires North Carolina to return nearly $80 million (plus interest) *to the Commission. The Commission is not suing North Carolina to recoup funds that are owed to the other States.* Indeed, the Commission – and not the States that are parties to the Compact – [disbursed] the funds to North Carolina in the first place. In accordance with the Compact, the Commission itself generated virtually all of those funds through the assessment of fees on users of the regional waste disposal facility.

U.S. Br., No. 131, Orig., at 16-17 (emphasis added).

There is thus no genuine dispute that recovery of the $80 million "sanction" is relief *only* the Commission can seek as plaintiff – no State can claim (or has claimed) any independent entitlement to those funds, which were paid to North Carolina by the Commission out of disposal fees levied on *private* users. To be sure, the Court's grant of leave to file the Complaint in this case implicitly recognizes the States' entitlement to "assert[] their *own* rights under the Southeast Compact," U.S. Br., No. 132, Orig., at 11, and they are indeed now free to try to prove their *own* claims based on the alleged violation of their *own* "rights" under the Compact. But nothing in the complaint alleges or even suggests that the States themselves suffered the loss of $80 million or are entitled to restitution in that amount. Each Count of the Complaint asserts only that generally "the Plaintiffs" suffered losses or are entitled to restitution, including the $80

million. That general allegation, however, is consistent with what the Commission and the Solicitor General have said from the outset: the Commission (and only the Commission) suffered the loss of $80 million, while the States suffered *other* "out-of-pocket" losses, which together comprise the collective losses suffered by "the Plaintiffs." It would be frivolous – and irreconcilable with the Commission's previous arguments before this Court – for the plaintiff States now to read their Complaint as asserting losses to the States *themselves* in the amount of the $80 million paid out by *the Commission* from *private user fees*.

The relief the Commission seeks in this action is thus not only wildly out of proportion to the relief the States seek, it is also different in kind: the recovery the Commission seeks is essentially restitution of money paid; whatever else the States themselves may try to show as damages, they cannot seek anything like *restitution*, as the other States never had an ownership interest in the money themselves in the first place. *See Korea Supply Co. v. Lockheed Martin Co.*, 63 P.3d 937, 947 (Cal. 2003) ("The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest."); *Restatement of Restitution* § 1, comment a (1937) ("A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money."); *Restatement (Second) of Contracts* § 370, comment a (1981) ("A party's restitution interest is his interest in having restored to him any benefit that he has conferred on the other party. . . . Restitution is, therefore, only to the extent that he has conferred a benefit on the other party. . . . The benefit must have been conferred by the party claiming restitution."). For this reason the Commission is not a mere tag-a-long party in a case otherwise properly before this Court. If the Commission cannot make its own claim for restitution from North Carolina's treasury, this case will be about a very different kind

of damage, *viz.*, whatever direct losses to the States that they are able to allege and establish. Accordingly, even assuming it is correct to say that because a State lacks immunity from suit by one party, it is stripped of its immunity from suit by all others with substantially the same claim, here the claims are not substantially the same.

Second, and more broadly, the pre-*Pennhurst II* decisions allowing non-federal, non-State parties to proceed with claims against nonconsenting States appear to have rested on a narrow conception of the Eleventh Amendment as governing only the exercise of this Court's subject-matter jurisdiction. Once that jurisdiction is properly invoked, the reasoning suggests, the Eleventh Amendment serves no function and the immunity it embodies ceases to operate. That view cannot be reconciled with the long line of cases recognizing that the Eleventh Amendment is not solely about the exercise of the federal judicial power, but embodies a more fundamental sovereign immunity from suit in all courts against all claims by all non-federal, non-State parties, unless there is a valid waiver or abrogation of immunity.

As early as *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall explained that the Eleventh Amendment is premised not so much on the indignity of subjecting a State to suit in *federal court*, but on the indignity of being subjected to suit by *monetary creditors* who – like the Commission here – are *not* sister States, *id.* at 406-07.

More recently, the Court's holding in *Alden v. Maine*, that the sovereign immunity at the core of the Eleventh Amendment extends to suit in state as well as federal courts, firmly establishes that the Eleventh Amendment implicates more than just the exercise of federal judicial power over a State. The "States' immunity from suit is a fundamental aspect of the[ir] sovereignty," the Court explained, and it "neither derives from, *nor is limited by*, the terms of the Eleventh Amendment." 527 U.S. at 713 (emphasis added).

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over nonconsenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, there is also the postulate that the States of the Union, still possessing the attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention. This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.

527 U.S. at 730 (internal quotation marks, citations and alterations omitted). The Eleventh Amendment, in other words, is not only a limitation on this Court's jurisdiction (though it is at least that), but also an expression of the State's sovereign right to decide when and where and by whom it may be sued.

It is not just *Alden v. Maine* that recognizes this fundamental point. Indeed, one does not even have to accept *Alden*'s basic holding that Congress may not abrogate a state's immunity from suit in her own courts, *see, e.g.*, *Alden*, 527 U.S. at 760 (Souter, J., dissenting), to accept that a State is immune from suit in *any* court absent her consent at least as a matter of common law, unless Congress validly abrogates her immunity, *see id.* at 798; *College Savings Bank*, 527 U.S. at 700 (Breyer, J., dissenting) ("Sovereign immunity is a common-law doctrine . . . permitting Congress to narrow or abolish state sovereignty where necessary."); *supra* note 1. Thus, although the scope of Eleventh Amendment immunity has been vigorously disputed in this Court's recent opinions, the Court has been unanimously of the view that, at least barring a valid abrogation, the Amendment "grants the State a legal power to assert a sovereign immunity defense should it choose to do so." *Wiscon-*

sin Dep't of Corrections v. Schacht, 524 U.S. 381, 389 (1998); *see Hess*, 513 U.S. at 39 ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals."); *see also Briscoe v. President & Dirs. of Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837) ("No sovereign state is liable to sued without her consent."). Because there has been no abrogation here, *see supra* note 3, the limits of North Carolina's immunity from suit by non-federal, non-State entities are defined by her own consent – not by the assertion of this Court's jurisdiction.[5]

The Court has "long recognized that a State's sovereign immunity is 'a *personal privilege* which it may waive at pleasure.'" *College Savings Bank*, 527 U.S. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)) (emphasis added). Thus a State may waive its immunity from suit in state court but not federal, *see id.* at 676, and a State may waive its immunity from suit by persons bringing state-law claims but not analogous federal claims, *see Alden*, 527 U.S. at 758. To the extent that a State chooses "to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." *Id.* This Court has never held that a State's consent to one class of claims automatically waives its immunity from all others, such that barred claims may ride piggy-back on permitted claims. To so hold would obviously nullify the

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[5] It is true, as the United States has observed, that the presence of the Commission does not deprive this Court of original jurisdiction over this action. U.S. Br., No. 132, Orig., at 12. But it does not follow that the Court therefore has jurisdiction over the claims of all parties, including the Commission. *Schacht* holds squarely to the contrary: the presence of an Eleventh Amendment-barred claim does not destroy a federal court's "original jurisdiction" over the action for purposes of removal, but it does require that the barred claim be dismissed. 524 U.S. at 389.

State's constitutional (or common-law) privilege to decide when it will consent to be sued.

The same principle should apply here. Indeed, this Court's cases have made clear that the States' amenability to suits in this Court by the United States and by sister States is nothing more than a form of structural waiver – the States implicitly consented to such suits, and only such suits, in the plan of the convention. *See supra* at 3-4. To say that the invocation of this Court's jurisdiction by the United States or a sister State automatically opens the door to private claims against a State contradicts the structural consent reflected in the plan of the convention.

Beyond the two kinds of suit specifically contemplated in the founding era, this Court made clear in *College Savings Bank* that there are *only* "two circumstances" in which a State may be subjected to suit in federal court: when Congress validly abrogates the State's immunity, and when the State waives its immunity. 527 U.S. at 670. There has been no abrogation by Congress and no waiver by North Carolina here. *College Savings Bank* says nothing about a "third circumstance," i.e., when the State is already being sued by the United States or by other States. It follows that even if the moving States are entitled to proceed against North Carolina on whatever claims they can sustain, North Carolina remains immune from suit by the Commission, unless and until North Carolina consents to such suit. It has not done so.

CONCLUSION

For the foregoing reasons, the motion to dismiss the claims of the Commission should be granted.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
NORTH CAROLINA
ATTORNEY GENERAL
GRAYSON G. KELLEY*
SPECIAL DEPUTY
ATTORNEY GENERAL
JOHN F. MADDREY
SPECIAL DEPUTY
ATTORNEY GENERAL
JENNIE WILHELM MAU
ASSISTANT ATTORNEY
GENERAL
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900
*Counsel of Record

Attorneys for Defendant

August 15, 2003

(14)

No. 132, ORIGINAL

Supreme Court, U.S.
FILED
SEP 24 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

PLAINTIFFS' OPPOSITION TO NORTH CAROLINA'S MOTION TO DISMISS

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
COLLEEN M. LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for Plaintiffs

* Counsel of Record
[Additional Counsel Listed on Inside Cover]

September 24, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

BILL PRYOR
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

PAUL G. SUMMERS
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

CHARLIE CRIST
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
STATE OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 487-1963

JERRY W. KILGORE
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Attorneys for Plaintiffs

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PLAINTIFFS' OPPOSITION TO NORTH CAROLINA'S MOTION TO DISMISS

INTRODUCTION

In its Motion to Dismiss, North Carolina argues: (a) that States are entitled to Eleventh Amendment immunity in actions brought by Compact-Clause entities; (b) that North Carolina did not waive its Eleventh Amendment immunity in the Southeast Interstate Low-Level Radioactive Waste Compact ("Compact"); and therefore (c) that the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission") should be dismissed from this original action, because its claims are barred by the Eleventh Amendment and are not identical to those of the States, whose claims are not barred by the Eleventh Amendment.

By granting the Motion for Leave to File a Bill of Complaint, this Court has already rejected North Carolina's argument that the plaintiff States are only nominal parties because they lack any interest in the $80 million owed to the Commission. See North Carolina Opposition to Motion for Leave to File Bill of Complaint ("Opp.") at 12-13. The instant motion to dismiss simply makes that rejected argument in a different form. The premise of the motion – that the Commission's claims do not mirror the States' claims – is wrong. The Commission and the State plaintiffs all stated legal claims for violation of the Compact and breach of contract and sought restitution and other damages. The States clearly have a right to seek enforcement of the Compact, including enforcement of the restitution order imposed as a result of North Carolina's refusal to perform its obligations under the Compact. It is settled law that the claim of a non-State party in an original action may proceed, despite any alleged Eleventh Amendment defense to such a claim, so long as either a State or the United States is making the same claim. *Arizona* v. *California*, 373 U.S. 546, 564 (1963);

Maryland v. *Louisiana*, 451 U.S. 725, 735-44 & n.21 (1981); *Oklahoma* v. *Texas*, 258 U.S. 574, 581-82 (1922). For this reason alone, the Commission's claims may proceed and the motion to dismiss should be denied.

If the Court reads the complaint to allege "different" claims for the Commission and the States, it will have to confront the question whether the Court has ancillary jurisdiction over the Commission's different claim in this original action or, in the alternative, the more fundamental constitutional question whether a State is entitled to Eleventh Amendment immunity from suit by a Compact-Clause entity for violation of a Compact. To avoid having to address these questions, the Court should simply read the Bill of Complaint, as plaintiffs intended, to state the same legal claims for the Commission and the States and deny the motion to dismiss on this non-constitutional ground.

ARGUMENT

I. IN AN ORIGINAL ACTION, A NON-STATE PARTY MAY PROCEED WITH A CLAIM BARRED BY THE ELEVENTH AMENDMENT IF A STATE PLAINTIFF IS MAKING THE SAME CLAIM.

This Court has original jurisdiction to decide and enforce claims by a State against a sister State for money damages and other relief. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1 (2001); *Texas* v. *New Mexico*, 482 U.S. 124, 130 (1987). This is such an action.

As North Carolina recognizes, see Motion to Dismiss at 8-9, "the presence of non-state parties . . . does not affect the exclusive jurisdiction of the Supreme Court." Stern et al., *Supreme Court Practice* 475 (6th ed. 1986) (citing *Arizona* v. *California*, 460 U.S. 605, 614 (1983), *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21). North Carolina also expressly acknowledges that the claim of a non-State party in an original action

may proceed *despite any alleged Eleventh Amendment defense to such a claim*, as long as either a State or the United States is making the same claim. Motion to Dismiss at 8-9 (citing *Arizona* v. *California*, 460 U.S. at 614, *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21). North Carolina argues, however, that the Commission must be dismissed from this original action because the Commission's claim that the Compact was breached and that North Carolina must pay restitution is barred by the Eleventh Amendment to the Constitution, and because the State plaintiffs are not making the same claim and seeking the same relief.

North Carolina's argument is a house of cards built on the unsound premise that the claims of the Commission and of the States are fundamentally different. The State plaintiffs – Alabama, Florida, Tennessee, and Virginia – are parties to a contract, the interstate Compact, which they seek to enforce. They have filed claims against North Carolina for its breach of their rights under the Compact and for its breach of Contract. See, *e.g.*, Bill of Complaint 11 ("Count I – Violation of the Member States' Rights Under the Compact"); *id.* at 12 ("Count II – Breach of Contract"). The violations of law alleged by the Commission and the States are identical. Moreover, the States have a direct interest in enforcing their rights under a contract and an interstate compact. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1 (2001); *Nebraska* v. *Iowa*, 406 U.S. 117 (1972). In this case, that means the States have a direct interest in enforcing North Carolina's obligations under the Compact, including its current obligation to make restitution. In addition, the States were directly affected by North Carolina's failure to develop, license, and construct a disposal site pursuant to its statutory and contractual obligation under the Compact. The States lost valuable time, as well as the $80 million that could have been invested to produce a disposal site in another member State or could be used to promote access to a disposal facility elsewhere.

North Carolina contends, however, that the plaintiff States have no direct legal claim to the restitution of the $80 million owed to the Commission, because such restored funds would not be paid directly to the States and never belonged to the States. This contention is wrong for two reasons.

First, like any party to a contract, the States have a direct interest in the enforcement of that contract, whether it calls for payments to the States themselves or to some third party (here, the Commission). Under the Compact, North Carolina now has a legal obligation to pay money to a third party (the Commission) – a third party created by the contract itself – and the member States of the Compact have a right to enforce this obligation. Put differently, there is nothing unique about a contract calling for the payment of money to a third party, and a contracting party has a right to enforce that obligation. Moreover, the Compact's member States plainly have a direct interest in restitution of the money to the Commission so that the Commission can address the States' need for long-term access to alternative disposal facilities – a need that arose as a result of North Carolina's failure to provide such a facility. See also U.S. Brief, No. 131, Orig. at 11 ("[t]he moving States are entitled to pursue any available compact remedy for North Carolina's alleged breach of the Compact," including restitution).

Second, the plaintiff States have a further contract-based interest in the restitution of the payments that went to North Carolina. Leaving aside each State's initial $25,000 contribution, the Compact expressly provides that:

> [e]ach state hosting a regional disposal facility shall annually *levy special fees or surcharges* on all users of such facility . . . the total of which . . . b. *Shall represent the financial commitments of all party states to the Commission*; and c. Shall be paid to the Commission. [Opp. App. 15a-16a (emphasis supplied).]

Under the Compact, accordingly, the funds resulting from the levy are "the financial commitments of all party states to the Commission." *Id.* at 16a.

Thus, North Carolina is wrong on two counts when it asserts that the member States cannot seek restitution because they "never had an ownership interest in the money themselves in the first place." Motion to Dismiss at 12. Under the Compact, the member States did have, and continue to have, an ownership interest in the money paid to North Carolina. In addition, the member States have a right under the Compact – their contract – to enforce their contractual right to North Carolina's payment of restitution to the Commission.

In reality, North Carolina does not argue on the merits that the claims of the Commission and the States are different. It instead cobbles together some citations from the briefing of the Motion for Leave to File a Bill of Complaint not in this case, but in Original No. 131 – a case in which the member States of the Compact were *not* parties. It uses those citations to argue that in Orig. No. 131, the Commission effectively agreed that its claims in that case are different from claims that the States might have made in that case, but did not. Motion to Dismiss at 10-11. The statements certainly do not demonstrate that in this proceeding "the Commission seeks a form of relief substantially different from that which the States could seek on their own." *Id.* at 10.

First and dispositively, the statements were made *by the Commission* in support of the Motion for Leave to File a Bill of Complaint in Orig. No. 131, an action to which *none* of the States were parties. Thus, nothing that the Commission said in urging this Court to grant the Motion in Orig. No. 131 could waive the member States' rights to make whatever claims they deem fit in this subsequent original action. And, here, the States' claims seek relief that mirrors that sought by the Commission. Moreover, that relief redounds to the benefit of the States as plaintiffs.

Second, the statements made in Orig. No. 131 reflect the reality that while the Commission is entitled to enforce the sanction it imposed and to be directly paid restitution, the member States are entitled to enforce the Compact (which now includes the sanction) and to seek the payment of restitution not to themselves, but to the Commission. (The member States can also seek direct payment of their out-of-pocket costs, as the cited statements make clear. Motion to Dismiss at 11.) Thus, the Commission has the right under the Compact to seek to enforce the sanctions and to "'*collect the $ 90 million (plus interest) that is owed to it.*'" *Id.* at 10 (quoting Commission Supp. Br. No. 131, Orig., at 5-6); *id.* at 11 (quoting U.S. Br., No. 131, Orig., at 16-17) (explaining that the restitution would be paid "'*to the Commission*'"). The member States, however, are entitled to seek the same outcome – *viz.*, an order requiring North Carolina to pay restitution to the Commission – although they do not request that North Carolina pay the money directly to them.[1]

In the context of Orig. No. 131, the critical point made by the Commission's cited statements is that the Commission – as the party that imposed and sought to enforce the sanctions and the party to whom the restitution should be paid – should have been permitted to represent the interests of the member States and to invoke this Court's original jurisdiction. This Court *rejected* that argument by denying the Motion for Leave to File A Bill of Complaint in Orig. No. 131, and instead required that the member States become parties and assert their own rights to enforcement of the Compact in order to invoke the original jurisdiction of this Court. In this case,

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[1] Thus, while no State claims "independent entitlement" (Motion to Dismiss at 11) to the restitution at issue here, all member States have a right, as members of the Compact, to seek enforcement of the Compact requiring the payment of restitution to the Commission. That is precisely the relief the States seek; and, accordingly, it is simply wrong to assert, as North Carolina does, that the States seek relief that differs from that sought by the Commission.

accepting this Court's implicit rejection of the Commission's prior arguments, the Commission and the States made the same legal claims and sought the same relief.

In the circumstances presented here, as North Carolina acknowledges, the established rule is that a non-State party such as the Commission may proceed with its claim in an original action. As this Court has stated, "it is not unusual to permit intervention of private parties in original actions." *Maryland* v. *Louisiana*, 451 U.S. at 745-46 n.21.

In *Arizona* v. *California*, the Court allowed Indian tribes to proceed with claims against the defendant State, despite the State's Eleventh Amendment immunity. The Court explained that the tribes' claims were the same as those already brought by the United States, and therefore that the Court's "judicial power over the controversy" would not be enlarged by allowing the tribes to proceed and "the States' sovereign immunity protected by the Eleventh Amendment is not compromised." 460 U.S. 605, 614 (1983). Similarly, in *Maryland* v. *Louisiana*, the Court allowed 17 pipeline companies seeking tax refunds to intervene as plaintiffs in an original case because the challenged state tax had been imposed on these companies and their participation would lead to "a full exposition of the issues." 451 U.S. at 745 n.21.

Finally, in *Oklahoma* v. *Texas*, the Court allowed private parties to intervene in a boundary dispute that affected them, although "independent suits to enforce the claims" would not have been entertained by the Court. 258 U.S. 574, 581 (1922). Indeed, the Court recognized that where the Court assumes jurisdiction over certain property or funds, it has ancillary jurisdiction to resolve non-State parties' claims to such property or funds, and thus to resolve ancillary claims that would otherwise be barred by the Eleventh Amendment:

> It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as

> ancillary to the suit wherein the possession is taken and the control exercised – and this although independent suits to enforce the claims could not be entertained in that court. [*Id.*]

Cf. *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (allowing oil companies to participate as plaintiffs without expressly barring or authorizing their pursuit of individual tax refund claims).

Under this Court's established jurisprudence, the claims of the Commission may proceed in light of their fundamental identity with the claims of the member States.[2]

The Commission does, of course, have an important role to play in this litigation. It acts on behalf of all member States, not only those who are party plaintiffs. Though not obligated to do so under the Compact, the Commission decided to funnel financial support to North Carolina to develop the region's second disposal site; it also conducted the funding negotiations and the sanctions proceeding and is best situated to provide information on all aspects of low-level radioactive waste disposal pertaining to the Compact and its member States. As noted *supra*, however, North Carolina's motion to dismiss is simply a disguised version of the argument made in opposition to the Motion for Leave to File A Bill of Complaint that the member States of the Compact are only nominal parties and that only the Commission has a real and direct interest in the claims made against North Carolina. The Court implicitly rejected this argument by granting that motion over North Carolina's opposition.

The motion to dismiss should be denied.

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[2] Nothing in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), casts any doubt on this analysis. In that case, which was not within the Court's exclusive, original jurisdiction, the private parties were seeking to proceed with pendent state-law claims wholly independent of any federal constitutional claims raised by the United States. *Id.* at 103 n.12.

II. THE COURT SHOULD INTERPRET THE BILL OF COMPLAINT TO STATE THE SAME CLAIMS FOR ALL PLAINTIFFS TO AVOID THE CONSTITUTIONAL QUESTIONS OTHERWISE POSED.

The question whether North Carolina has Eleventh Amendment immunity arises in an entirely unique context. Congress, in its sole, unfettered discretion, has authorized several States to take action that they otherwise are forbidden to take – *i.e.*, to form a compact. Congress has established the terms of the member States' participation and has expressly created a Compact-Clause entity, granted that entity certain powers, and preserved the right to judicial review and enforcement of the terms of the Compact. North Carolina has voluntarily consented to participate on Congress's terms. See *College Savs. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("[u]nder the Compact Clause, States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity"); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (holding that a bistate commission created by an interstate compact, which the Court assumed partook of state sovereign immunity, had consented to suit by reason of a suability provision attached to the congressional approval of the compact).

Although the Court has held that in an original action, it has ancillary jurisdiction over some different, but related claims by non-State parties, see *Oklahoma* v. *Texas*, 258 U.S. at 581, the Court has never precisely defined the scope of this Court's ancillary jurisdiction over such claims in original actions to enforce interstate Compacts. Accordingly, if the Court holds that the Commission and the States are making "different" claims, it will have to determine the extent of its ancillary jurisdiction in original actions and whether the Commission's claims fall within it.

In addition, if the Court were to conclude that it did not have ancillary jurisdiction sufficient for it to address the different claims made by the Commission (whatever those differences are), the Court would have to confront the question whether a member State has Eleventh Amendment immunity from claims made by a Compact entity. This Court has never addressed the question. See *Entergy Ark., Inc.* v. *Nebraska*, 68 F. Supp. 2d 1093, 1096 (D. Neb. 1999) ("[n]one of the [Court's Eleventh Amendment] cases . . . deal with an interstate compact signed by a state-defendant, approved by Congress under the Compact Clause of the Constitution, which is sought to be enforced by a compact-created entity that brings suit against the state-defendant"), *aff'd in part, rev'd in part*, 241 F.3d 979 (8th Cir. 2001). Cases holding that States are entitled to Eleventh Amendment immunity from suit by federal corporations, foreign states, and Indian tribes do not answer the question whether States that voluntarily consent to join Compacts under terms expressly authorized by Congress are immune from the enforcement of those Compacts by entities that are also congressional creatures of the Compact. The only court to address the question held that, in this setting, States do not possess Eleventh Amendment immunity. See *id.* at 1099 (holding that once States "enter into an arena from which they were, at the Founding, specifically barred," the Eleventh Amendment does not presumptively apply, and that under our constitutional structure, states that enter into compacts do not retain sovereign immunity as against the compact entity); cf. also *College Savs. Bank*, 527 U.S. at 686 (suggesting that the question of a State's Eleventh Amendment immunity is "fundamentally different" under the Compact Clause).

Both of these issues – the scope of the Court's ancillary jurisdiction over a different, but related claim by a non-State party in an original action and the scope of a State's Eleventh Amendment immunity from suit by a Compact-Clause entity – present difficult, undecided constitutional questions.

Plaintiffs respectfully submit that this Court should avoid addressing these questions, and should instead construe the Bill of Complaint as it is most naturally read – to state the same claims on behalf of the Commission and the States.

CONCLUSION

The motion to dismiss the Commission from this action should be denied.

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

PAUL G. SUMMERS
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
COLLEEN M. LAUERMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

CHARLIE CRIST
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
STATE OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 487-1963

JERRY W. KILGORE
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Attorneys for Plaintiffs

* Counsel of Record

September 24, 2003

AMER
RECORDS
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 7 - 2003
OFFICE OF THE CLERK

No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS CLAIMS OF SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
NORTH CAROLINA
ATTORNEY GENERAL
GRAYSON G. KELLEY*
SENIOR DEPUTY
ATTORNEY GENERAL
JOHN F. MADDREY
SPECIAL DEPUTY
ATTORNEY GENERAL
JENNIE WILHELM MAU
ASSISTANT ATTORNEY
GENERAL
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900
*Counsel of Record

Attorneys for Defendant

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REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant State of North Carolina has moved to dismiss the claims of plaintiff Southeast Interstate Low-Level Radioactive Waste Commission ("Commission") on the ground that the Commission's claims are barred by the Eleventh Amendment and by the constitutional and common-law principles of sovereign immunity embodied in that Amendment.

In their response plaintiffs concede most of what is necessary for this Court to dismiss the Commission's claims. Plaintiffs do not argue that the Commission is a "State" and therefore entitled to sue despite the Eleventh Amendment. Plaintiffs do not seriously contend that the sovereign immunity embodied in the Eleventh Amendment is categorically inoperative against claims by the Commission. Neither do plaintiffs argue that North Carolina has actually waived its immunity from suit in federal court or that Congress unambiguously abrogated that immunity.

Plaintiffs offer only a single argument as to why the Commission's claims should be allowed to proceed: the Commission's claims are the same as the co-plaintiff States' claims, which are not barred by Eleventh Amendment/sovereign immunity, and therefore North Carolina can be forced to defend against the Commission's claims as well as the States'. This argument is meritless.

To begin with, plaintiffs' suggestion that the exercise of federal "ancillary jurisdiction" over the identical claims of non-State entities suffices to strip a State of its sovereign immunity from those claims cannot be reconciled with this Court's Eleventh Amendment/sovereign immunity jurisprudence, which holds that a State is entitled to assert such immunity *even if* a federal court otherwise has jurisdiction over the claim. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) ("The Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pen-

dent jurisdiction where claims are pressed against the State."). Although the Motion to Dismiss carefully elaborated this point, Mot. to Dismiss 13-16, plaintiffs offer no response. By applying its now settled Eleventh Amendment/sovereign immunity jurisprudence to the Commission's claims against North Carolina, the Court can easily dispense with the Commission's claims, without delving into the plaintiffs' back-and-forth stories about whether the States are entitled to seek the same recovery sought by the Commission, *viz.*, direct payment to the Commission of the $80 million the Commission awarded itself in its rump "hearing."

Should the Court find itself compelled to explore the shifting grounds beneath plaintiffs' argument, however, it will discover that the plaintiffs were correct the first time: the States *do not* state the same claims as the Commission because they *cannot* state the same claims as the Commission. Plaintiffs now argue that the claims are the same because the States, like the Commission, are simply suing to see that the Commission gets paid. But the States very specifically and repeatedly disavowed their ability to obtain such relief in the last action. Make no mistake about it: the arguments made to this Court all along have been those of the Commission *and* the States. In the last action the Commission was explicitly acting as the agent of the States in this Court, and the States cannot now legitimately disclaim the positions the Commission took on their behalf, with their knowledge and consent. And the States sent the Commission to litigate on their behalf last time because they surely knew that a State cannot obtain relief on behalf of another party whose own claim would be barred. *Compare* Comm. Reply, No. 131, Orig., at 6 ("any compensation would immediately return to the Commission") *with North Dakota v. Minnesota*, 263 U.S. 365, 375 (1923) (dismissing claim where State plaintiff "intend[ed] to pay over" any recovery to private parties). The injuries the States assert, and the recoveries they seek, must be their own. Because the injuries

and recoveries that are personal to the States are very different from – a "small fraction" of, Comm. Supp. Br., No. 131, Orig. at 6 – the injuries asserted and recovery sought by the Commission *qua* Commission, the Commission's effort to ride piggy-back on the claims of the States must fail.

I. A STATE DOES NOT LOSE ITS SOVEREIGN IMMUNITY FROM SUIT BY A NON-STATE ENTITY MERELY BECAUSE THAT PARTY'S CLAIMS ARE THE SAME AS THE CLAIMS OF A STATE CO-PLAINTIFF

Plaintiffs' brief in opposition starts from the premise that North Carolina "expressly acknowledges" (Pls. Opp. 2-3) that Eleventh Amendment immunity is inoperative whenever a claim barred by the Eleventh Amendment is joined with an identical claim that is not so barred. The balance of plaintiffs' brief then argues that the Commission's claims are identical to those of the States.

Plaintiffs' starting premise is incorrect, indeed baffling: North Carolina assuredly did *not* acknowledge that it cannot claim immunity from the Commission's claims if they are identical to those of the States. To the contrary, the Motion to Dismiss made quite clear our position that Eleventh Amendment-barred claims cannot proceed against a non-consenting State *even if* the claims are redundant of claims asserted by a State or the United States. *See* Mot. Dismiss 13-16. "To say that the invocation of this Court's jurisdiction by the United States or a sister State automatically opens the door to private claims against a State," we explained, "contradicts the structural consent reflected in the plan of the convention." Mot. Dismiss 16. "[E]ven if the moving States are entitled to proceed against North Carolina on whatever claims they can sustain, North Carolina remains immune from suit by the Commission, unless and until North Carolina consents to such suit. It has not done so." *Id.*

The only point North Carolina "expressly acknowledge[d]" is that in two cases claims otherwise barred by the Eleventh Amendment were allowed to proceed when they were joined with identical, non-barred claims. Mot. Dismiss 8-9.[1] But North Carolina has specifically argued that the principle suggested in those cases should *not* be followed here. Mot. Dismiss 13. Rather, we argued, the Court should follow the more recent precedent in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103 n.12 (1984), and recognize that the mere presence of claims by sister States does not strip North Carolina of its sovereign immunity from claims of the Commission.

As plaintiffs themselves describe it, the principle adopted in the pre-*Pennhurst II* cases is that so long as the claims of a non-State, non-federal entity are "ancillary" to the claims of a State or the United States, then this Court may assert its "ancillary jurisdiction" over the otherwise barred claims. Pls. Opp. 7-10. As previously explained in the Motion to Dismiss, the problem is that other precedents of this Court –

---

[1] Plaintiffs cite a third case also mentioned in the Motion to Dismiss, *Oklahoma v. Texas*, 258 U.S. 574, 582-82 (1922), but the Eleventh Amendment does not appear to have been raised as a defense by the State in this case, as it is not mentioned in the Court's opinion. In one of the only two cases in which the Eleventh Amendment *was* raised in this situation, *Maryland v. Louisiana*, 451 U.S. 725 (1981), a citation to *Oklahoma v. Texas* was the sole basis for rejecting the State's claim of Eleventh Amendment immunity. *Id.* at 745 n.21. Since neither case proposes any actual principle or rule for overcoming a State's sovereign immunity in this situation, they provide an extremely weak basis for stripping North Carolina of its immunity here. The other case, *Arizona v. California*, 460 U.S. 605 (1983), does offer a two-sentence explanation for rejecting the State's claim of immunity, *see id.* at 614, which is that so long as this Court has adequate jurisdiction over some claims against a State, a State cannot claim immunity against other, identical claims. As explained in the Motion to Dismiss and in the text here, *infra* at 4-7, that theory has been effectively disavowed by the Court in more recent Eleventh Amendment/sovereign immunity cases.

and especially key recent precedents – have made clear that the Eleventh Amendment is not just a restriction on the jurisdiction of this Court. Rather, the Amendment embodies a broader rule of sovereign immunity, pursuant to which the State itself is empowered to decide who may sue it and where. *See, e.g., Alden v. Maine*, 527 U.S. 706, 713, 730 (1999). And while the members of this Court have disagreed over whether that immunity is implicit in the constitutional design or embedded in the common law, all have agreed that sovereign immunity, whatever its theoretical foundation, operates in practice to shield States from suit in federal court, unless the immunity is unambiguously waived by the State or validly abrogated by Congress. *See* Mot. Dismiss 14-15. No party to this action seriously contends that such immunity has been waived or abrogated.

It is thus beside the point whether this Court might have jurisdiction over a given claim that is "ancillary" to its original jurisdiction. Under this Court's Eleventh Amendment jurisprudence, it makes no difference whether a federal court has "jurisdiction" *of any kind* over a given claim against a State. All that matters is whether the State decides to invoke its immunity against that claim. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) ("whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction"). If the State does not invoke that immunity, then the federal court may exercise its jurisdiction and the claim may proceed to judgment. *See Wisconsin Dep't of Corrections v. Schact*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . . Nor need a court raise the defect on its own. Unless the State raises the matter, the court can ignore it."). But if the State does invoke its immunity

against a claim, then the court loses its power to adjudicate *that* claim. *See id.* at 392-93 ("A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims in the case before us. A federal court can proceed to hear those other claims . . . ."); *see generally Pennhurst II*, 465 U.S. at 121 ("A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment."). The mere existence of federal jurisdiction – be it original or removal or the more ephemeral "ancillary" jurisdiction – is not enough to force a sovereign State to submit to the claims of an unwanted suitor.

Indeed, this Court specifically recognized this point and effectively disavowed the ancillary jurisdiction theory of the pre-*Pennhurst II* cases in *Oneida County*, *supra*. In that case, a party whose claims against a State were otherwise barred by the Eleventh Amendment argued that the claims could be heard because they fit within the normal "ancillary jurisdiction" of the federal court. This Court agreed that the claims "raise[] a classic case of ancillary jurisdiction," 470 U.S. at 251, but held, relying on *Pennhurst II*, that such jurisdiction did not suffice to overcome the State's sovereign immunity:

> The Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). As we held in *Pennhurst*: "[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.*, at 121. The indemnification claim here, whether cast as a question of New

> York law or federal common law, is a claim against the State for retroactive monetary relief. In the absence of the State's consent, *id.* (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), the suit is barred by the Eleventh Amendment. Thus, as the Court of Appeals recognized, whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction over the counties' claim for indemnification. *Pennhurst, supra.*

Oneida County, 470 U.S. at 251. The decisions in *Oneida County* and *Pennhurst II* foreclose continued reliance on the ancillary jurisdiction theory suggested in earlier cases.

The fact is that not even plaintiffs propose any viable theory for why the Commission's claims should be allowed to proceed. They simply point to the pre-*Pennhurst II* cases, but make no effort to explain how the ancillary jurisdiction principle in those cases can be reconciled with this Court's other cases establishing that such jurisdiction cannot override the assertion of a State's sovereign immunity.

Rather than actively defend the application of ancillary jurisdiction, plaintiffs haltingly suggest that perhaps Eleventh Amendment/sovereign immunity might be *categorically inapplicable* to the claims of a Compact Clause entity such as the Commission. Pls. Opp. 10. Plaintiffs decline to argue the point, however, asserting only that it is a "difficult" question not presented here, because (they say) the Complaint can be read as stating identical claims on behalf of the Commission and the States, which they assert creates ancillary jurisdiction. *Id.* This dodge is inadequate, however, because the fundamental point is that *even if* the claims are identical, the Commission's claims cannot proceed. Thus the question whether Eleventh Amendment immunity applies to claims by Compact Clause entities cannot be avoided. Fortunately it is not a difficult one.

As all parties appear to agree, the Commission is not a State for Eleventh Amendment purposes. As explained in the Motion to Dismiss, this Court has held the Eleventh Amendment to be categorically inapplicable to only two types of claims: those by the federal government, and those by other States – the two types of claims explicitly contemplated in the plan of the Convention that underlies our constitutional structure. Mot. Dismiss 3-4 (citing cases). The Court would thus have to add a third category of claims – claims by Compact Clause entities – to the short list of claims exempted from the Eleventh Amendment. Plaintiffs' suggestion that it might be "difficult" to decide whether to do so is based loosely on three points.

The first is the confusing assertion that "Congress has established the terms of the member States' participation and has expressly created a Compact-Clause entity, granted that entity certain powers, and preserved the right to judicial review and enforcement of the terms of the Compact." Pls. Opp. 9. Plaintiffs evidently mean this as a suggestion that the Compact either abrogates its member States' immunity or reflects their consent to be sued in federal court, but the suggestion is confusing because the premise is utterly false: *nowhere* does this Compact "preserve[] the right to judicial review." To the contrary, the Compact is entirely silent on judicial enforcement of its terms. In fact, the only penalties and enforcement mechanisms explicitly set forth in the Compact are self-executing: suspension or termination by the Commission of a member-State's disposal privileges under the Compact. Compact art. IV(e)(7),(11), art. VII(f), NC Opp. App. 13a, 14a, 23a. In any event, whatever may be inferred from the Compact's silence on judicial enforcement, certainly neither abrogation nor waiver of sovereign immunity can be inferred from such silence. Unless the Compact specifically says that its member States are subject to suit by the Commission in federal court, the States' immunity remains intact. Mot. Dismiss 6-7 & nn.2-3 (discussing re-

quirements for waiver and abrogation). Far from including any specific statement waiving sovereign immunity, the Compact actually includes its opposite: "The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and *nothing in this compact shall be construed to infringe upon, limit or abridge those rights.*" Compact, art. III, NC Opp. App. 9a (emphasis added).

Second, plaintiffs cite a single district court decision, *Entergy Ark., Inc. v. Nebraska*, 68 F. Supp. 2d 1093 (D. Neb. 1999), *aff'd in part, rev'd in part*, 241 F.3d 979 (8th Cir. 2001). But in that case, the State of Nebraska had unambiguously waived its immunity in the terms of that Compact:

> When it signed the Compact, Nebraska consented to a suit brought by the Commission in federal court. The words and structure of the Compact and the Congressional enabling legislation plainly authorize the Commission's suit. In fact, the Commission is "required" to sue Nebraska in "any forum" and in "any court of law" chosen by that body. Still further, the Compact specifically provides that the federal court has the power to review disputes between the Commission and Nebraska.

68 F. Supp. 2d at 1103; *see also* 241 F.3d at 986 (court of appeals opinion in same case: "Based on the nature of the Compact and the language of Article IV(e), we held 'that by entering into the Compact, Nebraska waived its [Eleventh Amendment] immunity from suit in federal court by the Commission to enforce its contractual obligations.'"). *Entergy* thus establishes, at most, that a State *can* waive its immunity by joining a Compact that clearly provides for its enforcement through federal court actions against member States. Because the Compact here includes no such provision, *Entergy* indirectly confirms that North Carolina remains immune.

Finally, plaintiffs cite this Court's statement in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), that "[u]nder the Compact Clause, States *cannot* form an interstate compact without first obtaining the express consent of Congress." *Id.* at 686. Again, the citation appears to suggest a waiver or abrogation argument, but here the Compact includes no language of waiver or abrogation at all.

All parties agree that Congress approved the terms of the Compact, and that North Carolina consented to them. Although plaintiffs are inexplicably resistant, the parties should also be able to agree that the Compact does not include any provision for consent to suit by the Commission in federal court. That should end the Court's inquiry. North Carolina has not consented to suit by the Commission, so this Court cannot exercise jurisdiction – original, ancillary, or otherwise – over the Commission's claims.

II. THE STATES CANNOT SEEK RELIEF ON BEHALF OF THE COMMISSION

As the Motion to Dismiss explained, in the very few cases in which non-State, non-federal entities were allowed to intervene in original actions against States, the claims were substantially identical to others properly before the Court, and thus were within what the Court apparently deemed its "ancillary jurisdiction." While subsequent cases have effectively disavowed that principle, *see supra* at 4-7, it has no application here in any event. Contrary to the one argument plaintiffs affirmatively make in their brief – but consistent with what they repeatedly have said to the Court until now – the claims of the Commission are not identical to those of the States. In short, the Commission seeks restitution for itself, a claim the States cannot make.

Plaintiffs contend that the claims of the States and the Commission are identical because each seeks the payment of $80 million (plus interest) directly to the Commission. As

noted in the Motion to Dismiss, however, the proposition that the States may validly seek on their own behalf a payment of money directly to the Commission is 180 degrees opposite from the proposition advanced aggressively by the Commission in No. 131, Original. In that case, the Commission repeated as often as it could its position that the Compact's member-States "cannot enforce directly the full sanction against North Carolina." Comm. Supp. Br., No. 131, Orig., at 6; *see id.* ("only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it"); *id.* (emphasizing the "disconnect between the relief that the States and the Commission can seek"); *id.* (distinguishing between "the States' great interest in the enforcement of the Commission's sanction, and the more minor relief that they can seek individually"); *id.* at 7 (action by one or more individual States "would not . . . provide the Commission, or its member States, with an adequate remedy"); *id.* at 8 ("there is no significant monetary recovery available to th[e] State[s] from this Court").

Plaintiffs make no effort to explain why the Commission's carefully articulated position in No. 131 was wrong; instead they merely scoff at the suggestion that it bears any relevance here, simply because the States were not parties to that case. Pls. Opp. 5. But of course *the Commission* was a party, and what it said then it flatly contradicts now, without explanation or apology. More importantly, the States themselves cannot evade responsibility for the positions asserted in No. 131. Contrary to their current pleas of innocence, the States were in fact active participants in that case – except that rather than file the action themselves, as they did this time, the States in that case, "exercising their sovereign powers," Comm. Supp. Br., No. 131, Orig., at 8, formally appointed the Commission to file the action *on their behalf*. As the Commission's brief represented to this Court: "the States, each represented by Commissioners appointed ac-

cording to each State's law, have formally authorized the Commission to bring suit in their stead." Comm. Reply Br., No. 131, Orig., at 3. Thus, it was repeatedly argued, "the Commission stands in the shoes of the six party States." *Id.* at 2; *see id.* at 1 (Commission "represents six states in this Court"). Accordingly, *none* of the plaintiffs is in a position to contend credibly that the States can now seek relief for the direct benefit of the Commission – relief they were positive they could *not* seek when they sent the Commission itself here to seek enforcement of the sanctions in No. 131.

The conclusion that the States could not seek restitution to be paid directly to the Commission is as sound now as it was then. In fact, the States likely did not initially bring this action themselves because they did not believe they could, given this Court's decision in *North Dakota v. Minnesota*, 263 U.S. 365 (1923). The Court held in that case that the Eleventh Amendment precluded it from maintaining jurisdiction over a claim by one State against another, where the plaintiff State was merely seeking damages to be paid directly to private persons whose own claims were barred by the Eleventh Amendment. *Id.* at 375-76. Because it was "inconceivable" that the plaintiff State was suing "without intending to pay over" its entire recovery directly to the private parties, the defendant State was entitled to assert Eleventh Amendment immunity against the claim of the State.

So it is here. In this case "any compensation would immediately return to the Commission." Comm. Reply, No. 131, Orig., at 6; *see* Pls. Opp. 6 & n.1. All parties agree that the States can seek to recover their out-of-pocket expenses and other direct losses, but that *only* the Commission can assert any claim to the restitution at issue here. Pls. Opp. 6 & n.1.[2] *North Dakota v. Minnesota* makes clear, however, that

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[2] In view of plaintiffs' concession that only the Commission can receive "the payment of restitution," Pls. Opp. 6 n.1, it is unclear what point the States are making by claiming some actual ownership interest

the States may not seek a remedy on behalf of a party that may not seek the remedy itself. The States may only pursue that to which *they* may be entitled – here, their out-of-pocket expenses, just as the Commission explained in No. 131.[3]

CONCLUSION

For the foregoing reasons, the motion to dismiss the claims of the Commission should be granted.

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in the funds resulting from the levy on *private* waste facility users, Pls. Opp. 4-5. If plaintiffs mean only to argue that the States have an *interest* in enforcing the Compact, the point is unexceptional but irrelevant: a State may well have a very strong interest in advancing some private party's claims, but a State can only assert its *own* claims consistent with the Eleventh Amendment. In any event, the asserted basis for the States' claim of ownership interest is nonexistent. Plaintiffs argue that, because the funds resulted from the "annual levy" of special fees and surcharges, the funds are "the financial commitments of all the party states" which constitutes an ownership interest. But plaintiffs misread the Compact. As clearly indicated in the introductory language of Article IV and paragraph (h), the text quoted by plaintiffs addresses funding of the Commission's "annual budget" through an annual surcharge levied by the host state. NC Opp. App. 15a-16a. This language does not address the multiple surcharges levied by the Commission through the first regional disposal facility for the express purpose of assisting North Carolina with the efforts to site, license, and construct the second regional disposal facility *outside* of the "annual budget."

[3] It is incorrect to say that this Court, in declining to exercise jurisdiction in No. 131, *must* have *rejected* the argument that the States cannot themselves seek restitution for the Commission. Pls. Br. 6-7. Rather, inherent in the Court's action in No. 131 was the conclusion that because a Compact Clause entity is not a State, such an entity cannot invoke this Court's original jurisdiction. That would be true even if, as the Commission argued, the Compact Clause entity is the only party that can properly bring a particular claim in which the States have an interest. Accordingly, the Court's refusal to exercise jurisdiction in No. 131 does not reflect a necessary rejection of the Commission's argument that the States' own claims would differ from the Commission's. The fact that this Court allowed the States to proceed with their own claims in this action means exactly that: the States are allowed to proceed *with their own claims*.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
NORTH CAROLINA
ATTORNEY GENERAL
GRAYSON G. KELLEY*
SENIOR DEPUTY ATTORNEY
GENERAL
JOHN F. MADDREY
SPECIAL DEPUTY
ATTORNEY GENERAL
JENNIE WILHELM MAU
ASSISTANT ATTORNEY
GENERAL
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900
*Counsel of Record

Attorneys for Defendant

October 7, 2003

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No. 132, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

STATE OF ALABAMA, STATE OF FLORIDA,
STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA,
AND THE SOUTHEAST INTERSTATE LOW-LEVEL
RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

ON MOTION TO DISMISS THE COMMISSION,
MOTION FOR SUMMARY JUDGMENT,
AND MOTION TO DISMISS THE COMPLAINT

PRELIMINARY REPORT OF THE SPECIAL MASTER

BRADFORD R. CLARK
Special Master
Washington, D.C.

April 2009

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Response of Pipeline Companies to Louisiana's Exceptions to Special Master's Report, *Maryland v. Louisiana*, 1980 WL 339270, *3 (U.S. 1980) (No. 83, Orig.) 7

This Preliminary Report was originally distributed to the parties in June 2006, but not filed with the Supreme Court at that time. The Special Master is now filing this Preliminary Report simultaneously with his Second Report. The Preliminary Report addresses three preliminary legal motions filed by the parties. North Carolina filed a Motion to Dismiss the claims of the Southeast Interstate Low-Level Radioactive Waste Management Commission, the Plaintiffs filed a Motion for Summary Judgment, and North Carolina filed a Motion to Dismiss the Bill of Complaint. For the reasons set forth below, the Special Master recommends that the first two motions be denied and the third be granted in part and denied in part.

I. Background

In 1986, with the consent of Congress, the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia entered into the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Compact"), Pub. L. No. 99-240, Tit. II, 99 Stat. 1871, as amended by the Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, § 2, 103 Stat. 1289. The purpose of the Compact was to provide facilities for the disposal of the region's low-level radioactive waste. The Compact created the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission"), consisting of

two voting members from each State, to administer the Compact.[1]

Under the Compact, a preexisting disposal facility in Barnwell, South Carolina, owned by that State, served as the initial disposal facility for the region until a new facility could be built. In September 1986, the Commission selected North Carolina to be the second host State to construct and operate a new regional facility. Under the terms of the Compact, the Commission is not "responsible for any costs associated with . . . the creation of any facility." Compact, Art. 4(K). Nonetheless, the Commission decided in 1988 to provide financial assistance to the second host State for pre-operational costs associated with the construction of a new facility. The Commission raised substantial revenue through various surcharges on waste brought to the Barnwell facility and used these funds to assist North Carolina's efforts to site and develop a new facility. From 1988 through 1997, the Commission provided North Carolina with close to $80 million in assistance. During the same period, North Carolina expended approximately $50 million of its own funds, but did not begin construction of a new facility.

By the end of 1997, the Commission ceased providing North Carolina with additional financial

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[1] The following description is based on the submissions of the parties and does not consist of findings by the Special Master. This description is intended solely to provide background and context for this Report and in no way precludes the parties from contesting any of the propositions set forth herein.

assistance, in part because South Carolina had withdrawn from the Compact in 1995, thereby depriving the Commission of further revenue from the Barnwell facility. North Carolina withdrew from the Compact in July 1999. In December 1999, the Commission held a Sanctions Hearing, found that North Carolina had breached the Compact, and ordered it to repay close to $80 million it received from the Commission along with an additional $10 million sanction and attorney's fees. North Carolina did not participate in this hearing and did not comply with the Commission's order. The Commission subsequently attempted to sue North Carolina in the original jurisdiction of the Supreme Court, but the Court denied the Commission leave to file its complaint. *See Southeast Interstate Low-Level Radioactive Waste Management Comm'n v. North Carolina*, 533 U.S. 926 (2001).

The Commission, joined by Alabama, Florida, Tennessee, and Virginia, filed a similar complaint, and the Court granted leave to file in 2003. North Carolina then moved to dismiss the Commission for lack of jurisdiction. After the case was assigned to the Special Master, North Carolina filed a motion to dismiss the complaint for failure to state a claim, and the Plaintiffs filed a motion for summary judgment with respect to Count I of the complaint. The parties, and the United States as amicus curiae, subsequently appeared before the Special Master to argue all three of these motions.

II. North Carolina's Motion to Dismiss the Commission

As a preliminary matter, North Carolina moves to dismiss the claims of the Commission on the grounds that these claims are barred by the Eleventh Amendment and principles of state sovereign immunity. Although North Carolina acknowledges that States cannot assert sovereign immunity to bar suits brought against them by sister States or the United States, it insists that a State cannot be sued without its consent in the Supreme Court's original jurisdiction by other parties, such as the Commission.

The Plaintiffs oppose North Carolina's motion to dismiss the Commission on the ground that several of the Court's prior precedents have permitted non-State parties to intervene in original actions—at least when the non-State parties are asserting the same claims and seeking the same relief as the original parties. *See Arizona v. California*, 460 U.S. 605 (1983); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Oklahoma v. Texas*, 258 U.S. 574 (1922). The Plaintiffs maintain that the Bill of Complaint asserts the same claims on behalf of the Commission and the States. Accordingly, the Plaintiffs urge the Court to deny the motion and allow the Commission to remain a party to the suit.

North Carolina's Reply takes the position that the Commission's claims cannot proceed against a non-consenting State even if the claims are the same as those asserted by the Plaintiff States. Specifi-

cally, North Carolina maintains that the Court has effectively disavowed the ancillary jurisdiction theory of its earlier cases in subsequent decisions. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Accordingly, North Carolina insists that state sovereign immunity requires the Court to dismiss the Commission's claims.

The Special Master recommends that the Court deny North Carolina's motion to dismiss the Commission's claims at this point in the proceedings. The threshold question is whether the Commission should be treated as a State or as a non-State party in evaluating North Carolina's claim of sovereign immunity. The Supreme Court has held that Compact Clause entities do not themselves enjoy Eleventh Amendment immunity when sued in federal court. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). According to the Court, such "entities occupy a significantly different position in our federal system than do the States themselves." *Id.* at 400. Although an open question, the logic of the Court's opinion in *Hess* suggests that if Compact Clause entities should not be treated as States when they are sued as defendants, then they should not be treated as States when they sue as plaintiffs. Given the Special Master's recommendation with respect to North Carolina's motion to dismiss the Commission, however, it is not necessary to resolve this question at this time.

Careful review of the Court's precedents suggests that a non-State party may join a State or the

United States in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs. The Plaintiffs in this case have filed a joint Bill of Complaint and are currently asserting the same claims and seeking the same relief against North Carolina. North Carolina suggests that the Plaintiff States may not be entitled to assert some of the claims that the Commission is entitled to assert, but this question cannot be resolved without further factual and legal development. If and when the Commission asserts claims that the States themselves cannot assert, North Carolina remains free to renew its motion and seek dismissal of such claims.

The Supreme Court's prior decisions support this resolution. For example, in *Maryland v. Louisiana*, the Court permitted several pipeline companies to intervene as plaintiffs in an original action brought by several States and the United States against Louisiana. The suit challenged the constitutionality of Louisiana's "First Use Tax" on certain uses of natural gas brought into Louisiana, principally from the Outer Continental Shelf. As the Court explained, because the challenged tax was "directly imposed on the owner of imported gas and . . . the pipelines most often own the gas, those companies have a direct stake in this controversy." 451 U.S. at 745 n. 21. Accordingly, the Court permitted the companies to intervene "in the interest of a full exposition of the issues." *Id.* Significantly, there was no indication that the pipeline companies as-

serted any claims or sought any relief other than those pursued by the original plaintiffs. On the contrary, the pipeline companies specifically asserted in their brief before the Supreme Court that the "proposed complaint attached to the pipelines' motion [to intervene] raised the same constitutional issues as those raised by the plaintiff States." Response of Pipeline Companies to Louisiana's Exceptions to Special Master's Report, *Maryland v. Louisiana*, 1980 WL 339270, *3 (U.S. 1980) (No. 83, Orig.).[2]

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[2] In opposing North Carolina's motion to dismiss the Commission, the Plaintiffs also rely on *Oklahoma v. Texas*, 258 U.S. 574 (1922). In that case, Oklahoma sued Texas to settle a controversy between them over the location of their common boundary along the course of the Red River, and over title to the southern half of the river bed. The United States intervened to set up a claim to the river bed as against both States. In order to prevent armed conflicts among rival aspirants, the Court appointed—at the suggestion of the United States and with the approval of the States—a receiver to take possession of the disputed portion of the river bed and to control and conduct all necessary oil and gas operations therein. *Id.* at 580. The Court's order established a mechanism for ascertaining and holding the net proceeds of oil and gas operations in such a way that they could be paid to whoever was ultimately determined to be the rightful owner. *Id.* As contemplated by the Court's order, interested parties intervened to assert rights to portions of the river bed and the net proceeds of the associated oil and gas. The Court permitted the interventions on the narrow ground that they all related to tracts and funds in the receiver's possession and thus exclusively within the Court's control. According to the Court: "It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised—and this although independent suits to enforce the claims could not be

Similarly, in *Arizona v. California*, the Court permitted several Indian tribes to intervene in an original action brought by Arizona against California to determine the parties' rights to the waters of the Colorado River. In earlier proceedings, the United States intervened to assert water rights on behalf of five Indian Reservations dependent on the river for water. Several of the affected Indian tribes moved to intervene in order to assert their water rights directly. Both States opposed intervention on the ground that the tribes' participation in the suit without their consent would violate the Eleventh Amendment. The Court began by noting that the water rights at issue had already been asserted by the United States on behalf of the tribes and that nothing in the Eleventh Amendment prevents the United States from bringing suits against States. *See* 460 U.S. at 614. The Court then rejected the States' Eleventh Amendment defense on relatively narrow grounds:

> The Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting

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entertained in that court." *Id.* at 581. Because the Eleventh Amendment was neither raised by the parties nor discussed by the Court, the decision has no direct bearing on the pending motion.

> leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Id. In other words, because the United States had—consistent with the Eleventh Amendment—already asserted water rights claims on behalf of tribes against States, permitting the real parties in interest (the tribes) to intervene to assert the same claims would not expose the States to any additional claims barred by the Eleventh Amendment.[3]

As applied to this case, these precedents suggest that the Eleventh Amendment permits the Commission to remain a party so long as it does not assert any claims other than those that the Plaintiff States are entitled to assert. North Carolina asserts that there is "no genuine dispute that recovery of the $80 million 'sanction' is relief *only* the Commission can seek as plaintiff." N.C. Mot. to Dismiss Comm'n at 11. As support for this proposition, North Carolina relies primarily on several statements made by the Commission when it initially sought leave to file suit by itself against North Carolina in Original No. 131. These statements suggested that only the Com-

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[3] At the time that *Arizona v. California* was decided, the Court had not yet determined whether States possess sovereign immunity from suits brought by Indian tribes. The Court assumed in *Arizona*—consistent with its subsequent resolution of this question in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)—that States enjoy such immunity. *See Arizona v. California*, 460 U.S. at 614 (assuming arguendo that "a State may interpose its immunity to bar a suit brought against it by an Indian tribe").

mission, and not the member States, may seek to enforce the Commission's sanction against North Carolina and recover funds provided by the Commission.[4] In response, the Plaintiffs point out that these statements were made by the Commission rather than the States. In addition, on the merits, they argue that "like any party to a contract, the States have a direct interest in the enforcement of that contract, whether it calls for payments to the States themselves or to some third party (here, the Commission)." Pl. Opp. to Mot. to Dismiss Comm'n at 4. The Special Master therefore does not agree, at this stage of the proceedings, that the Commission's claim seeking enforcement of the $80 million sanction is necessarily a separate and distinct claim.

North Carolina maintains that the Supreme Court has effectively disavowed its earlier precedents and that the Court's more recent decisions recognize that the Eleventh Amendment bars parties other than States and the United States from asserting claims of any kind against a State without its consent. Specifically, North Carolina relies on two cases: *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), and *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985). While these

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[4] At oral argument on its motion, North Carolina clarified that it is not making an estoppel or law of the case claim. Transcript of Hearing Before the Special Master (Sept. 3, 2004) ("Tr.") at 13-14. Rather, North Carolina is merely urging that the Commission's prior submissions are persuasive on the question whether the Commission and the States have separate claims.

cases strongly endorse state sovereign immunity, they do not require dismissal of the Commission's claims at this stage of the proceedings.

The *Pennhurst* litigation began when residents of the facility and the United States sued Pennhurst State School and Hospital, and various Pennsylvania officials, alleging numerous violations of both federal and state law. The United States Court of Appeals for the Third Circuit affirmed relief based on the provisions of a federal statute, but the Supreme Court reversed on the ground that the statute did not create any substantive rights. *See* 451 U.S. 1 (1981). The Court remanded the case to the Court of Appeals to determine if the remedial order could be supported by any other provision of state or federal law. On remand, the Court of Appeals reaffirmed its prior judgment solely on the basis of state law and rejected the argument that the Eleventh Amendment barred a federal court from considering pendent state law claims against state officers and institutions. The Supreme Court reversed, holding that the Eleventh Amendment barred these claims in federal court.

Significantly, the Court rejected the plaintiffs' argument that "the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration." 465 U.S. at 104 n.12. The Court reasoned that while the Amendment does not bar the United States from suing to enforce federal law, "the United States does not have standing to assert the state-law claims of third-parties." *Id.* Thus, the question of Eleventh Amendment immu-

nity to the plaintiffs' state law claims was "unaffected by the United States' participation in the case," *id.*, and "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Id.* at 121. Under these circumstances, a "federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.* In *Pennhurst*, the Court concluded that the private plaintiffs' state law claim—unavailable to the United States—constitutes a claim against the State barred by the Eleventh Amendment. *Id.*

County of Oneida is similar. Several Indian Tribes sued two New York counties seeking damages for the fair rental value of land then and occupied by the counties. The Tribes claimed that the land was purchased by the State of New York from their ancestors in 1795 in violation of the Trade and Intercourse Act of 1793 ("Nonintercourse Act"), 1 Stat. 329. The counties impleaded the State as a third-party defendant and sought indemnification for any damages they owed to the Tribes. The United States Court of Appeals for the Second Circuit held that federal courts may exercise ancillary jurisdiction over this claim, but the Supreme Court reversed. Relying on *Pennhurst*, the Court held that the Eleventh Amendment forecloses "the application of normal principles of pendent and ancillary jurisdiction where claims are pressed against the State," 470 U.S. at 251, and that the claim is barred in the absence of the State's consent. *Id.*

Rather than effectively disavowing or overruling the Court's prior precedents, *Pennhurst* and *County of Oneida* simply underscore the limitation implicit in those decisions. If the United States or a State has already asserted an appropriate claim against a State, then permitting a private party with a stake in the outcome to assert the *same* claim does not infringe upon the State's Eleventh Amendment immunity. If, on the other hand, a private party attempts to assert a novel or different claim against a State, then the Eleventh Amendment bars the claim unless the State waives its immunity. In this regard, the Special Master agrees with the suggestion of the United States as amicus curiae that there is no present necessity to reconsider the continuing validity of the Court's prior precedents.

The Special Master agrees with the Plaintiff States—at least at this point in the proceedings—that they have the right to seek enforcement of the Compact and that their claims appear to be identical to those of the Commission. At oral argument, however, the Plaintiffs refused to stipulate that the Commission would forego a claim even if it was subsequently found to be unavailable to the States. Tr. at 19. Although no reason appears at this point in the proceedings why the States will be unable to pursue all of the claims they assert in their complaint, North Carolina is free to renew its motion to dismiss if and when the Commission attempts to

pursue a claim legally foreclosed to the States.[5] It suffices for present purposes that the Commission and the States are asserting the same claims and seeking the same relief. With respect to such claims, the Commission's participation would facilitate a full exposition of the issues. In addition, under *Arizona v. California*, *supra*, the Commission's assertion of such claims would not improperly enlarge the Court's judicial power over the case in contravention of the Eleventh Amendment.

For the foregoing reasons, the Special Master recommends that North Carolina's motion to dismiss the claims of the Commission be denied.

III. Plaintiffs' Motion for Summary Judgment

The Plaintiffs seek summary judgment against North Carolina on Count I of the Bill of Complaint. Count I alleges that North Carolina violated the Compact by failing to fund, license, con-

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[5] The Plaintiffs also assert that the Supreme Court effectively resolved whether the Commission may pursue its claims against North Carolina when it granted the Commission and the States' joint motion for leave to file this action. The Plaintiffs acknowledged at oral argument, however, that North Carolina did not raise the issue of sovereign immunity in opposition to the Plaintiffs' motion. Tr. at 15. Accordingly, North Carolina retains the right to assert such immunity if and when the Commission asserts a claim against it that the States cannot assert on their own. *See Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 515 n.19 (1982) (stating that an Eleventh Amendment defense "partakes of the nature of a jurisdictional bar" and may be raised at any time) (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)).

struct, and operate a regional disposal facility after being designated as a host State by the Commission in 1986. On July 26, 1999, North Carolina enacted a law withdrawing from the Compact. At the request of Florida and Tennessee, the Commission subsequently held a Sanctions Hearing, found that North Carolina had failed to fulfill its obligations under the Compact, and voted to require North Carolina to repay the $79,930,337 that it had received from the Commission to assist it in developing a disposal facility.[6] By this motion, the Plaintiffs are essentially seeking summary enforcement of the Commission's sanctions order against North Carolina. North Carolina, in opposing this motion and by filing its own motion to dismiss the Bill of Complaint in its entirety, essentially argues that it has no liability whatsoever to the Plaintiffs as a matter of law.

The Plaintiffs' Motion for Summary Judgment should be denied because the Compact does not authorize the Commission to impose monetary sanctions against member States, and because North Carolina withdrew from the Compact prior to the imposition of sanctions. In addition, North Carolina did not waive its right to contest enforcement of the Commission's order by failing to appear in that proceeding. Denial of the Plaintiffs' motion, however, merely means that the Commission's sanctions order

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[6] In addition, the Commission voted to require North Carolina to pay $10,000,000 for the loss of future revenue that the Commission would have received had the facility been built, as well as the Commission's attorney fees.

should not be summarily enforced. It does not mean that North Carolina faces no potential liability as a matter of law with respect to the Plaintiffs' other claims. *See* Part IV, *infra*.

A. The Commission's Authority to Impose Monetary Sanctions

In determining whether the Commission has authority under the Compact to impose monetary sanctions on member States, it is important to interpret the Compact as a coherent whole and in a manner consistent with its overall structure and purpose. *See Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.'"). Article 4 of the Compact establishes the Commission, and Article 4(E) describes its duties and powers.

Two provisions are particularly relevant here. First, Article 4(E)(7) authorizes the Commission to designate a host State for the establishment of a needed regional facility, and "to revoke the membership of a party State that willfully creates barriers to the siting of a needed regional facility." Compact, Art. 4(E)(7). Second, Article 4(E)(11) authorizes the Commission "[t]o revoke the membership of a party

State in accordance with Article VII(f)." Compact, Art. 4(E)(11). Article 7(F), in turn, provides in pertinent part:

> Any party State which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party State to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party State.

Compact, Art. 7(F). Resolution of the Plaintiffs' summary judgment motion turns on whether the Compact authorizes the Commission to impose monetary penalties on a party State as a sanction.

Plaintiffs emphasize the word "including" and argue that the plain language of the Compact authorizes the Commission to impose a variety of sanctions including monetary penalties. Specifically, the Plaintiffs argue that the "word 'including' is not a term of exclusion or limitation," Pl. Mot. for S.J. at 25, and that the Southeast Compact should be interpreted to authorize monetary sanctions notwithstanding their express omission. As the Supreme Court has explained, however, a "word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan*, 546 U.S. at 486. Moreover, the term "including" is not always used as a term of enlargement. On the contrary, sometimes the term is used simply to provide examples of the kinds of things that are meant to be included. In

such circumstances, the term should not be read to authorize any and all possible alternatives. *Cf. Dong v. Smithsonian Institution*, 125 F.3d 877, 880 (D.C. Cir. 1997) (interpreting the term "includes" narrowly when no general principle appears behind the statute's enumeration of examples).

Indeed, the Plaintiffs seem unable to articulate any clear principle that would limit the range of sanctions available to the Commission if the Compact is interpreted to authorize sanctions other than suspension of rights and revocation of party status. At oral argument, for example, the Special Master asked the Plaintiffs whether the Commission has authority under the Compact to sanction a member State by requiring it to surrender all of its tax revenue to the Commission for a two-year period. The Plaintiffs responded that such a sanction would be subject to some kind of excessiveness challenge and would go beyond the authority of the Commission. Tr. at 79. At the same time, however, the Plaintiffs expressed the view that the Commission has authority to impose a punitive fine, such as treble damages, on the ground that a sanction implies that there is a punishment. Tr. at 83. The only limitation is that the sanction must be "reasonable." *Id.* Finally, the Plaintiffs were skeptical that the Commission could sanction North Carolina by ordering it to allow South Carolina to build and run a low-level radioactive waste disposal facility in North Carolina. *Id.*

The Plaintiffs' skepticism is well founded. As they acknowledge, the Compact expressly preserves the sovereign prerogatives of the States. Article 3 of

the Compact provides: "The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights." Compact, Art. 3. Permitting the Commission to override a State's territorial integrity and health and safety regulations would undoubtedly infringe upon the sovereign rights of the State reserved by the Compact. Similarly, as numerous cases recognize, ordering a State to pay money from its treasury implicates state sovereignty. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Thus, an order by the Commission ordering a State to pay money damages would appear "to infringe upon, limit or abridge" the rights of sovereign States reserved under the Compact.

The Plaintiffs seek to overcome the effect of the Compact's express reservation of sovereign rights by arguing that the States gave up or waived some of these rights—including the right to be free from monetary sanctions—by entering into the Southeast Compact. If the Compact contained an express provision authorizing the Commission to subject member States to monetary sanctions, a reviewing court would have to confront the problem of reconciling such a provision with the Compact's instruction that it not be construed to abridge sovereign rights. In this case, however, the Compact is silent on the question of monetary sanctions. Thus, the Plaintiff's position is essentially that the Supreme Court should construe the Compact to authorize such sanctions by implication. Such a con-

struction, however, is precisely what the Compact forbids.

Based on Article 3 of the Compact, the Special Master agrees with the United States that the Compact should not be construed to confer power upon the Commission to impose monetary sanctions in the absence of a clear statement to that effect in the Compact. *See* Br. for U.S. at 18. A clear statement requirement ensures that the member States retain all of their sovereign rights unless they expressly surrender such rights in the Compact. The Plaintiffs object to the use of a clear statement rule on the grounds that it is inconsistent with Article 9 of the Compact and represents a misapplication of the Supreme Court's clear statement decisions. Neither objection is persuasive in this context.

Article 9 provides in pertinent part: "The provisions of this Compact shall be liberally construed to give effect to the purposes thereof." Compact, Art. 9. As Article 3 of the Compact makes plain, however, one of the purposes of the Compact is to preserve "the rights enjoyed by sovereign states." Compact, Art. 3. As discussed, construing the Compact to include implicit authorization to impose monetary sanctions would contradict Article 3. Thus, Article 9's general instruction to construe the Compact liberally should not be used to circumvent Article 3's more specific command not to construe the Compact to infringe upon the rights enjoyed by sovereign States.

The Plaintiffs nonetheless contend that their construction of the Compact is necessary to make it

effective. The Plaintiffs overlook the fact that the Commission's power to revoke the membership of a party State or to limit or suspend its rights under the Compact constitute serious sanctions. The member States entered into the Compact in order to enjoy the benefits of membership, such as the right to have waste stored, treated, and disposed of at regional facilities and other facilities made available pursuant to agreements entered into by the Commission. Compact, Art. 3(a). With respect to a State designated as a host State, revocation of membership would also deprive the State of all future revenue generated by operating the region's waste disposal facility. As discussed below, some Compacts go further and authorize monetary sanctions, but such sanctions are not inherently necessary to make the Compact effective.

More specifically, the Plaintiffs argue that limiting the Commission's sanctions authority to expulsion makes no sense in this case because it would allow North Carolina to escape its duties under the Compact while retaining the funds provided by the Commission to fulfill those duties. This argument is unpersuasive for two reasons. First, the Compact was drafted on the apparent assumption that a State (such as North Carolina) designated as a host State would bear the costs of building its own disposal facility and would not receive funding from the Commission. *See* Compact, Art. 4(K) (stating that "Commission shall not be responsible for any costs associated with . . . the creation of any facility"). On this assumption, expulsion is a meaningful

sanction because it would not only deprive a host State of the right to dispose of its own waste, but also deny it the opportunity to recoup its expenditures through operation of an exclusive regional facility. Second, the Plaintiffs' argument implicitly assumes that if the Commission lacks power to impose a monetary sanction, then there is no other remedy available for North Carolina's alleged misconduct. As the Plaintiffs themselves argue elsewhere, however, a judicial remedy may be available in appropriate circumstances independent of the Commission's sanctions authority. As discussed in Part IV, the Plaintiffs' complaint seeks just such a remedy.

The Plaintiffs also object that reliance on a clear statement rule in "original actions by States against States and by the United States against States would be dramatic, unprecedented, and unjustified." Pl. Reply in Support of Mot. for S.J. at 13. They suggest that a clear statement rule should apply only when a State has sovereign immunity under the Eleventh Amendment or the constitutional design. *Id.* at 12. The Plaintiffs are correct that in an original action like this one, a State enjoys no constitutional immunity from suit. The source of the clear statement rule in this case, however, is not the Constitution but Article 3 of the Compact itself, which provides that the Compact shall not be construed to infringe the sovereign rights of member States. In other words, reading Article 7(F) to limit the Commission's sanctions authority to revocation of membership and lesser included measures of the same

genus does not depend on some external source of respect for state sovereignty. Rather, this construction merely reflects the Special Master's interpretation of the Compact as a whole.

Viewing the Compact in its entirety, the Special Master believes that the Compact does not authorize the Commission to impose monetary sanctions against party States, and that the Plaintiffs' Motion for Summary Judgment should therefore be denied. Article 4(E) of the Compact sets forth the powers and duties of the Commission. Perhaps the most relevant provision is Article 4(E)(7), which empowers the Commission to designate a host State for the establishment of a new regional facility. That section specifically authorizes the Commission "to revoke the membership of a party State that willfully creates barriers to the siting of a needed regional facility." Compact, Art. 4(E)(7). In other words, if a party State is chosen to be a host State and willfully impedes completion of a new facility, then the Commission may revoke its membership. The other relevant provision of Article 4 is section (E)(11), which authorizes the Commission "[t]o revoke the membership of a party State in accordance with Article VII(f)." Compact, Art. 4(E)(11).

Conspicuously absent from Article 4—the article defining the powers of the Commission—is any mention of monetary sanctions. As discussed, this omission is significant because Article 3 requires the Compact to be construed to preserve the sovereign rights of the States. This omission is also noteworthy because other regional compacts approved by

Congress at the same time as the Southeast Compact expressly provide for monetary sanctions. For example, the Northeast Compact authorizes the compact commission to "impose sanctions, including but not limited to, fines, suspension of privileges and revocation of the membership of a party state." Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. IV(I)(14), 99 Stat. 1915. In addition, the Central Midwest Compact empowers the compact commission to impose on a host State that withdraws before fulfilling its obligations "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(f), 99 Stat. 1891. *See also* Central Interstate Low-Level Radioactive Waste Management Compact, Art. VII(e)(14), 99 Stat. 1870 (authorizing compact commission to require specific monetary payments as a sanction for non-compliance or failure to fulfill compact obligations).

Because the Southeast Compact was approved at the same time as these compacts, both Congress and the compacting States were presumably aware of the differing sanctions regimes established by the various compacts. The Southeast Compact's failure to include a provision expressly authorizing monetary sanctions contrasts sharply with other compacts and counsels against finding such power in the Southeast Compact.

The Supreme Court faced a similar question in *Texas v. New Mexico*, 462 U.S. 554 (1983). There, the Court considered whether the Pecos River Compact should be interpreted to give a federal representative a vote on the Pecos River Commission. The Court held that it should not, in part because "[o]ther interstate compacts, approved by Congress contemporaneously with the Pecos River Compact, allow federal representatives a vote on compact-created commissions." *Id.* at 565. The Court concluded that the "Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it." *Id.*

The Plaintiffs attempt to distinguish *Texas v. New Mexico* on the ground that in several other cases, the Supreme Court has ordered monetary relief for breach of a Compact even though the Compact did not expressly authorize such relief against a party State. *See* Pl. Reply in Support of Mot. for S.J. at 13 (*citing Texas v. New Mexico*, 482 U.S. 124, 130 (1987), and *Kansas v. Colorado*, 533 U.S. 1, 11 (2001)). The Plaintiffs, however, are conflating two distinct questions. The question raised by the Plaintiffs' motion is whether the Compact authorized *the Commission* to impose monetary sanctions on a member State. The cases cited by the Plaintiffs do not address this question. Rather, they merely establish the unexceptionable proposition that the Supreme Court, in the exercise of its original jurisdiction, may award money damages against a State for breach of a Compact in appropriate circumstances. Thus, the conclusion that the Compact does not au-

thorize the Commission to award money damages leaves open the possibility that the Court may ultimately award such damages in this case as part of an appropriate judicial remedy.

Finally, the Plaintiffs suggest that the Commission's interpretation of the Compact should receive deference similar to that given by courts to agency interpretations of statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The analogy is unpersuasive for several reasons. First, the Supreme Court has previously rejected the contention "that this Court may do nothing more than review official actions of . . . [a Compact] Commission, on the deferential model of judicial review of administrative action by a federal agency." *Texas v. New Mexico*, 462 U.S. at 566. Second, *Chevron* deference applies only when a statute is ambiguous—that is, when traditional tools of statutory construction do not yield a clear answer. *Chevron*, 467 U.S. at 843 n.9. Here, interpreted correctly, the Compact does not give the Commission authority to impose monetary sanctions on member States.

Third, the theory underlying *Chevron* deference is that Congress has implicitly assigned policymaking discretion to agencies rather than courts to resolve statutory ambiguities within a permissible range. Under these circumstances, courts defer to reasonable agency interpretations in order to respect Congress's institutional preferences. There is no reason to believe that the compacting States or Congress sought to assign this type of dis-

cretion to the Commission in this case. To the contrary, Article 3 of the Compact suggests that the parties to the Compact preferred to retain their sovereign rights, including their right to have the Supreme Court exercise independent judgment concerning the meaning and application of the Compact. Fourth, *Chevron* deference would be particularly inappropriate in this context because the Commission is a party to the case and stands to benefit financially from its own interpretation. In sum, although the Commission's views may provide some guidance as to the proper interpretation of the Compact, they cannot take the place of the independent judicial judgment to which the States are entitled under the Constitution.

For the foregoing reasons, the Special Master concludes that the Compact does not authorize the Commission to impose monetary sanctions on member States.

B. North Carolina's Withdrawal from the Compact

The Plaintiffs' Motion for Summary Judgment should also be denied because North Carolina withdrew from the Compact before the Commission voted to impose sanctions. The Plaintiffs maintain that the Commission's jurisdiction to sanction the conduct of a member State (such as North Carolina) is unaffected by the State's withdrawal from the Compact. In support of their position, the Plaintiffs rely again on Article 7(F), which provides:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state.

Compact, Article 7(F). In addition, the Plaintiffs contend that the Compact makes clear that a member State cannot escape its obligations by simply withdrawing from the Compact. *See id.* ("Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.").

North Carolina, by contrast, contends that it was free to withdraw from the Compact at any time before the Commission imposed its sanction. Article 7(G) of the Compact provides in pertinent part: "Subject to the provisions of Article VII section (h), any party state may withdraw from this compact by enacting a law repealing the compact . . . ." Compact, Art. 7(G). North Carolina enacted such a law and thus maintains that the Commission lacked jurisdiction over North Carolina after that date. Specifically, North Carolina argues that it was no longer a "party state" and thus no longer subject to sanctions by the terms of the Compact. North Carolina also points out that other regional compacts, adopted contemporaneously with the Southeast Compact,

expressly limit the right to withdraw in several ways.

For example, some compacts authorize imposition of sanctions on States even after they have withdrawn. *See* Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(d), 99 Stat. 1880, 1891 (1986) ("Withdrawal does not affect any liability . . . chargeable to a party state prior to the time of such withdrawal."); Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1892, 1900 (1986) (same); Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(h), 99 Stat. 1909, 1922 (1986) ("No withdrawal shall affect any liability . . . chargeable to a party state prior to that time."). Other compacts declare that such withdrawals are not effective for a specified period of time. *See* Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(d), 99 Stat. 1880, 1891 (1986) (stating that "no withdrawal may take effect until 5 years after the governor of the withdrawing state gives notice in writing of the withdrawal to the Commission"); Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1892, 1900 (1986) (same). The presence of these express limitations on withdrawal in other "interstate compacts, approved by Congress contemporaneously" with the Southeast Compact, suggests that such limitations should not be read into the Compact. *See Texas v. New Mexico*, 462 U.S. at 565.

In addition, the Southeast Compact contains an express provision restricting the right to withdraw, but it applies only after the second host State begins operating its disposal facility. Article 7(H) provides:

> The right of a party state to withdraw pursuant to Article VII section (g) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress.

Compact, Art. 7(H). This provision was added at the suggestion of North Carolina after it was chosen to be the second host State.[7] The negative implication of this provision, read in conjunction with Article 7(G), is that party States remained free to withdraw from the Compact at all times prior to the opening of the second waste disposal facility.

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[7] The evident purpose of this provision was to protect North Carolina after it became a host State. Restricting the States' right to withdraw would ensure that North Carolina had a steady stream of customers for its facility, which would help it recover development and construction costs. In addition, restricting the party States' right to withdraw would ensure that the State chosen to be the third host State could not withdraw after enjoying the right to dispose of its waste at the second host State's disposal facility.

Finally, the conclusion that party States may withdraw from the Compact and escape further sanctions by the Commission must be viewed in connection with the limited nature of the express sanctions available under the Compact. As discussed, the only sanctions expressly mentioned by the Compact are revocation of the membership of a party State and suspension or limitation of a party State's rights under the Compact. Under these circumstances, it is not surprising that the Compact does not generally limit a party State's right to withdraw. Once a State withdraws, it has effectively imposed upon itself the most severe sanction available to the Commission—loss of membership as a party State. Conversely, as one might expect, regional compacts that expressly authorize monetary sanctions also expressly limit the right to withdraw from the compact.

For example, the Central Midwest Compact authorizes its Commission to impose as a sanction on a host State that withdraws without fulfilling its obligations "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII (f), 99 Stat. 1891. At the same time, the Central Midwest Compact expressly provides that "[w]ithdrawal does not affect any liability . . . chargeable to a party state prior to the time of such withdrawal." *Id.* In other words, compacts such as the Central Midwest Compact that authorize non-rights-

based sanctions such as fines also limit withdrawal, whereas compacts such as the Southeast Compact that authorize only rights-based sanctions do not similarly limit withdrawal. Reading the sanctions and withdrawal provisions of the Southeast Compact together, moreover, makes sense because these provisions are both found in the same Article of the Compact.

For the foregoing reasons, the Special Master concludes that North Carolina was not subject to the sanctions authority of the Commission because it withdrew from the Compact before sanctions were imposed.

C. Waiver

Finally, the Plaintiffs maintain that North Carolina waived its right to contest the legality of the Commission's sanctions order by refusing to participate in the sanctions hearing. This suggestion is unpersuasive. Had the Compact clearly authorized the Commission to impose monetary sanctions and to restrict a party State's right to withdraw, perhaps North Carolina could have been found to have waived its right to contest such a sanction by failing to appear before the Commission. The Court need not reach this question, however, because the Southeast Compact contained no such express provisions.

North Carolina withdrew from the Compact in accordance with Article 7(G) and had no reason to participate in the Commission's subsequent proceedings. As North Carolina (correctly) interpreted the Compact, there was no need for a sanctions hearing.

The most severe sanction that the Commission was authorized to impose was revocation of North Carolina's status as a party State. Because North Carolina had already withdrawn from the Compact, it had no reason to contest the imposition of this sanction. If a State is to be deprived of its right to contest enforcement of a sanctions order, the Compact must at least provide clear and unambiguous notice of what is at stake in the proceedings. North Carolina's withdrawal from the Compact, however, does not mean that the Plaintiffs lack alternative means of asserting their claims. They have sued North Carolina in the original jurisdiction of this Court, and North Carolina's withdrawal from the Compact does not affect its potential liability in this forum. *See* Part IV, *infra*.

For the foregoing reasons, the Special Master recommends that the Plaintiffs' Motion for Summary Judgment be denied.

IV. North Carolina's Motion to Dismiss the Complaint

North Carolina moves to dismiss the Bill of Complaint for failure to state a claim upon which relief can be granted. North Carolina offers three grounds in support of its motion. First, North Carolina contends that the Commission's sanctions order cannot be enforced because it was no longer a party to the Compact when the sanctions were imposed. Second, North Carolina maintains that the sanctions order cannot be enforced because the Compact does not authorize the Commission to impose

monetary sanctions. Third, North Carolina argues that the Plaintiffs' rights against it arise solely out of the terms of the Compact and that the Plaintiffs cannot seek a judicial remedy beyond the remedies prescribed by the Compact.

North Carolina's first two arguments have already been discussed in connection with the Plaintiffs' Motion for Summary Judgment. *See* Part III, *supra*. These grounds suffice to deny the Plaintiffs' request for summary enforcement of the Commission's sanctions order. At the same time, they support North Carolina's motion to dismiss some of the relief requested by the Plaintiffs in their complaint. Specifically, the Bill of Complaint requests that the Court declare that North Carolina is subject to the jurisdiction of the Commission and subject to the Commission's sanctions decisions, notwithstanding North Carolina's withdrawal from the Compact. In addition, the Bill of Complaint requests that the Court declare that the sanctions against North Carolina imposed by the Commission are subject to enforcement. Because the Compact does not authorize the Commission to impose monetary sanctions and because North Carolina withdrew from the Compact before sanctions were imposed, the Special Master recommends that those portions of the Bill of Complaint requesting enforcement of the Commission's sanctions order be dismissed.

These two grounds, however, do not support dismissal of the remainder of the Bill of Complaint. In addition to seeking enforcement of the Commission's sanctions order, the Plaintiffs assert various

legal and equitable claims against North Carolina, including violation of the Compact, breach of contract, unjust enrichment, promissory estoppel, and money had and received. In connection with these claims, the Plaintiffs seek such damages, costs, and further relief as the Court deems just and proper. North Carolina's third ground in support of its motion attempts to justify dismissal of these claims.

In moving to dismiss the Bill of Complaint, North Carolina maintains that the Supreme Court has no more authority to award monetary remedies than did the Commission in the first instance because such remedies would be at odds with the Compacts's express provisions. There are essentially two steps in North Carolina's argument. First, North Carolina asserts that the Plaintiffs' claims arise solely and entirely out of North Carolina's alleged failure to fulfill its obligations under the terms of the Compact. Second, North Carolina contends that the Compact's clearly prescribed remedies—suspension and revocation of rights—are the exclusive remedies available to the Plaintiffs in this original action because "no court may order relief inconsistent with [a compact's] express terms, no matter what the equities of the circumstances might otherwise invite." *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (internal quotations omitted). Neither proposition withstands analysis.

With respect to North Carolina's first ground, it is not clear that all of the Plaintiffs' claims arise solely and entirely out of North Carolina's obligations under the Compact. Some do. For example,

Count I of the Bill of Complaint alleges that North Carolina violated the Compact by failing to fund, license, construct, and operate a regional disposal facility after it was designated as a host State. Similarly, Count II restates essentially the same claim as a breach of contract claim. The Plaintiffs' other claims, however, do not necessarily arise out of North Carolina's obligations under the Compact. Counts III and IV, in particular, may be construed to allege that the Commission provided North Carolina with close to $80 million in exchange for North Carolina's express or implied promise to construct and operate a regional disposal facility.

North Carolina has acknowledged—both in its briefs and at oral argument—that the Commission was not required to provide such funding under the terms of the Compact. Thus, arguably North Carolina's acceptance of these funds from the Commission signified its agreement to forego its right to withdraw under the Compact before building and operating a regional disposal facility. On this account, even if North Carolina were free to withdraw from the Compact after being designated a host State, it arguably was no longer free to do so after it accepted funding from the Commission. In other words, depending on the facts and circumstances, North Carolina and the Commission may have entered into a supplemental agreement under which both parties undertook obligations beyond the original terms of the Compact. Further proceedings are needed to determine (1) whether the parties intended to make such an agreement, (2) the precise

terms of any such agreement, and (3) whether the terms of the agreement provide a sufficiently certain basis for determining whether a breach has occurred and the nature of an appropriate remedy. *See Texas v. New Mexico*, 482 U.S. 124, 129 (1987). For these reasons, dismissal of the Bill of Complaint would be premature at this stage of the proceedings.

With respect to North Carolina's second ground, the Compact remedies (suspension and revocation of rights) are not the only ones that the Supreme Court may impose in the event that it finds North Carolina to have breached its obligations under the Compact. North Carolina quotes language from *New Jersey v. New York*, but that decision does not support its position. The case concerned the interpretation of an 1834 compact between New York and New Jersey fixing the boundary between the two States as the middle of the Hudson river except as otherwise provided therein. 523 U.S. at 773. One of the exceptions was that New York would retain jurisdiction over Ellis Island, then consisting of only three acres. *Id.* After the United States began using the Island to receive immigrants in 1891, it gradually expanded the Island by adding 24.5 acres to the original Island. Although this filled land fell on the New Jersey side of the boundary, New York continued to assert jurisdiction over the entire Island. New Jersey sued to settle the question and the Court found that New York has jurisdiction only over the original portion of the Island and that New Jersey has jurisdiction over the remainder.

In the course of this litigation, New Jersey challenged the Special Master's recommendation that the boundary between the two States be adjusted "for reasons of practicality and convenience." *Id.* at 810. The Supreme Court agreed with New Jersey that it lacked authority to adjust the boundary, *id.*, even though adhering to the precise boundary set forth in the compact would divide "not just an island but some of the buildings on it" as well. *Id.* at 811. It was in this context that the Court declared: "'[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms,' no matter what the equities of the circumstances might otherwise invite." *Id.* at 811 (citation omitted) (quoting *Texas v. New Mexico*, 462 U.S. at 564). Because a "fair construction" of the 1834 compact "calls for a line so definite," *id.*, the Court could not alter the line without contradicting the express requirements of the compact.

Here, by contrast, there is no similar conflict between the express terms of the Compact and the relief requested by the Plaintiffs. The Southeast Compact authorizes the Commission to sanction member States by suspending or revoking their rights under the Compact. It contains no provision, however, limiting *judicial* enforcement of the Compact or the imposition of appropriate judicial remedies. In this regard, the case is similar to *Texas v. New Mexico*, the original source of the language quoted by North Carolina. Texas and New Mexico entered into a compact to apportion the waters of the

Pecos Basin. The compact established a commission to administer the compact, consisting of two voting members (one from each State) and a non-voting member appointed by the United States. After the Commission deadlocked, Texas invoked the original jurisdiction of the Supreme Court and sought a decree commanding New Mexico to deliver water in accordance with the compact. New Mexico contended that the Court had no authority to act *de novo* or supplant the decisions of the commission. The Court disagreed, noting that "the mere existence of a compact does not foreclose the possibility that we will be required to resolve a dispute between the compacting States." 462 U.S. at 568.

The Court acknowledged that parties to an interstate compact may establish a commission "to be the exclusive forum for disputes between the States," *id.* at 569, but it stated that they must make their intention to do so clear. According to the Court: "In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id.* at 569-70. In that case, the Court retained jurisdiction and proceeded to the merits because "the express terms of the Pecos River Compact do not constitute the Commission as the sole arbiter of disputes between the States over New Mexico's [compact] obligations." *Id.* at 569.

Like the Pecos River Compact, the Southeast Compact does not establish the Commission as the exclusive arbiter of disputes among the party States over their rights and obligations under the Compact. Rather, it merely allows the Commission to further the goals of the Compact by suspending and revoking the membership rights of party States. If the Plaintiffs feel that these sanctions are inadequate to redress North Carolina's alleged violation of the Compact, then they remain free to pursue appropriate judicial remedies. *See Texas v. New Mexico*, 482 U.S. at 130 (recognizing "the propriety of money judgments against a State in an original action" even when the applicable compact lacks a "specific provision for a remedy in case of breach").

Further proceedings are necessary to determine whether North Carolina in fact breached its obligations under the Compact. At a minimum, the parties appear to agree that the Compact required "a good faith effort by North Carolina to site, license and construct a facility, consistent with the environmental, safety, and health requirements of the citizens of the State." N.C. Opp. to Pl. Mot. for S.J. at 38. North Carolina maintains that it acted in good faith, while the Plaintiffs "dispute North Carolina's good faith and allege that its bad faith conduct breached the Compact." Pl. Reply in Support of Mot. for S.J. at 22. The parties also disagree over whether North Carolina had any implied obligation under the Compact not to withdraw after being selected as a host State, and when if ever such an obligation attached. Further proceedings are also necessary to

evaluate the merits of the Plaintiffs' claims of unjust enrichment and money had and received. These claims appear to be based on a theory of restitution rather than a separate agreement.

In addition, to the extent that the Plaintiffs are alleging claims that arise outside the Compact, they are presumably free to pursue such claims in an original action such as this one. Of course, to the extent that the parties allege that North Carolina and the Commission entered into some kind of supplemental agreement outside the Compact, they may face a variety of legal and practical hurdles in seeking relief based on any such agreement. At this stage of the proceedings, however, no reason appears why such claims must be dismissed as a matter of law.

Further proceedings are necessary to determine whether North Carolina and the Commission entered into any supplemental agreement outside the four corners of the Compact, the precise terms of any such agreement, and whether either party breached the agreement. For example, the Plaintiffs have suggested that North Carolina promised not to withdraw from the Compact before completing a regional facility in exchange for the Commission's promise to provide additional funding. North Carolina has suggested something similar: "The recovery sought by the Commission is based on an entirely extra-contractual arrangement between North Carolina and the Commission," which is independent of North Carolina's "actual Compact obligations to the other compacting States." N.C. Reply Br. in Sup-

port of Mot. to Dismiss Complaint at 23. These suggestions raise several legal and factual questions that cannot be resolved without further proceedings.

With respect to any claims that arise outside the Compact, North Carolina renews its Eleventh Amendment objection. According to North Carolina, only the Commission—as opposed to the States—provided funds to North Carolina for which repayment could be made. Thus, according to North Carolina, only the Commission could seek restitution of these funds. If that is the case, then the Commission is asserting a claim that the States cannot assert on their own behalf, which in turn triggers Eleventh Amendment concerns. *See* Part II, *supra*. The Plaintiffs counter that under the terms of the Compact, the funds provided to North Carolina by the Commission "represent the financial commitments of all party states to the Commission." Compact, Art. 4(H)(2)b. Accordingly, the Plaintiffs maintain that the States have the right to seek repayment of such funds to the Commission because such repayment will inure to the benefit of the member States. At least at this stage of the proceedings, North Carolina has not shown that the States cannot assert this claim as a matter of law.

For the foregoing reasons, the Special Master recommends that North Carolina's Motion to Dismiss the Bill of Complaint be granted solely with respect to the Plaintiffs' request that the Court declare that North Carolina is subject to the jurisdiction of the Commission and that the Commission's sanctions order against North Carolina be enforced.

With respect to the remainder of the Bill of Complaint, the Special Master recommends that the motion be denied.

V. Conclusion

The Special Master recommends that North Carolina's Motion to Dismiss the Commission be denied, that the Plaintiffs' Motion for Summary Judgment be denied, and that North Carolina's Motion to Dismiss the Bill of Complaint be granted in part and denied in part.

Respectfully submitted,

BRADFORD R. CLARK
Special Master

2000 H Street, NW
Washington, D.C. 20052
Ph. (202) 994-2073
specialmaster132@law.gwu.edu

April 2, 2009

No. 132, Original

In the

Supreme Court of the United States

October Term 2008

State of Alabama, State of Florida, State of Tennessee, Commonwealth of Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission,

Plaintiffs,

v.

State of North Carolina,

Defendant.

On Motions for Summary Judgment

Second Report of the Special Master

Bradford R. Clark
Special Master
Washington, D.C.

April 2009

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This Report was initially distributed to the parties in January 2009 and is now being filed with the Supreme Court simultaneously with the Preliminary Report of the Special Master. After the parties received the Preliminary Report in June 2006, they commenced discovery. After partial discovery, the parties suspended discovery in order to file cross-motions for summary judgment. The Plaintiffs filed a motion for summary judgment on Count II of their bill of complaint, and North Carolina filed a motion for summary judgment on all of the Plaintiffs' claims. The Special Master held a hearing on the motions. After the hearing, at the request of the Special Master, the parties filed supplemental briefs addressing several issues that arose in the hearing. For the reasons set forth below, the Special Master recommends that the Plaintiffs' motion be denied and that North Carolina's motion be granted in part and denied in part.

I. Background

In 1986, with the consent of Congress, the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia entered into the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Southeast Compact" or "Compact"), Pub. L. No. 99-240, Tit. II, 99 Stat. 1871, as amended by the Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, § 2, 103 Stat. 1289. The purpose of the Compact was to provide facilities for the disposal of the region's low-level radioactive waste. The Com-

pact created the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission"), consisting of two voting members from each State, to administer the Compact.[1]

Under the Compact, a preexisting disposal facility in Barnwell, South Carolina, owned by that State, served as the initial disposal facility for the region until a new facility could be built. In September 1986, the Commission selected North Carolina to be the second host State to construct and operate a new regional facility. Under the terms of the Compact, the Commission is not "responsible for any costs associated with . . . the creation of any facility." Compact, Art. 4(K). Nonetheless, the Commission decided in 1988 that it was "necessary and appropriate" to provide financial assistance to the second host State for pre-operational costs associated with the construction of a new facility. The member States did not provide any of these funds directly. Rather, the Commission raised substantial revenue by imposing various surcharges and fees on waste brought to the Barnwell facility in South Carolina and used these funds to defray the costs associated with North Carolina's efforts to site and develop a new facility. From 1988 through 1997, the Commission provided North Carolina with approximately $80 million in assistance. During the same period,

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[1] The following description is based on the submissions of the parties and does not consist of findings by the Special Master. This description is intended solely to provide background and context for this Report and does not preclude future proceedings to adjudicate material facts should such adjudication prove necessary.

North Carolina expended approximately $34 million of its own funds, but the State did not succeed in obtaining a license to construct a new facility.

In 1995, South Carolina withdrew from the Compact, thereby depriving the Commission of additional revenue from the Barnwell facility and creating potential competition for any new regional facility. In 1996, the Commission initially informed North Carolina that it could not provide further funds. After North Carolina informed the Commission that it could not continue the project without financial assistance, however, the Commission agreed to continue its assistance from funds on hand. Finally, in late 1997, the Commission ceased providing North Carolina with additional financial assistance. North Carolina commenced an "orderly shutdown of the project" and withdrew from the Compact in July 1999.

In December 1999, the Commission held a Sanctions Hearing, found that North Carolina had breached the Compact, and ordered it to repay close to $80 million that it had received from the Commission along with an additional $10 million in sanctions and attorney's fees. North Carolina did not participate in this hearing and did not comply with the Commission's order. The Commission itself subsequently attempted to sue North Carolina in the original jurisdiction of the Supreme Court, but the Court denied the Commission leave to file its complaint. *See Southeast Interstate Low-Level Radioactive Waste Management Comm'n v. North Carolina*, 533 U.S. 926 (2001).

The Commission, joined by Alabama, Florida, Tennessee, and Virginia, subsequently filed a similar complaint, and the Court granted leave to file in 2003. The case was assigned to the Special Master on November 17, 2003.

After initial proceedings, the Special Master distributed a Preliminary Report to the parties on June 19, 2006, recommending that North Carolina's motion to dismiss the Commission's claims be denied; that the Plaintiffs' motion for summary judgment on Count I of the bill of complaint be denied; and that North Carolina's motion to dismiss the bill of complaint be granted in part and denied in part.

North Carolina's motion to dismiss the Commission's claims asserted that those claims are barred by the Eleventh Amendment and principles of state sovereign immunity. The Report noted that the logic of the Court's opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), "suggests that if Compact Clause entities should not be treated as States when they are sued as defendants, then they should not be treated as States when they sue as plaintiffs." The Report, however, recommended that the motion be denied—and that the Eleventh Amendment question not be resolved at that point in the proceedings—because "careful review of the Court's precedents suggests that a non-State party may join a State or the United States in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs."

The Report noted that the Plaintiffs "have filed a joint Bill of Complaint and are currently asserting the same claims and seeking the same relief against North Carolina," and that North Carolina's contention that the Plaintiff States may not be entitled to assert some of the claims that the Commission is entitled to assert could not be resolved without further factual and legal development. The Report also stated that "North Carolina is free to renew its motion to dismiss if and when the Commission attempts to pursue a claim legally foreclosed to the States."

The Report recommended that the Plaintiffs' motion for summary judgment on Count I of the bill of complaint—which essentially sought summary enforcement of the Commission's sanctions order against North Carolina—be denied because the Compact "does not authorize the Commission to impose monetary sanctions against member States, and because North Carolina withdrew from the Compact prior to the imposition of sanctions." The Report further concluded that "North Carolina did not waive its right to contest enforcement of the Commission's order by failing to appear in that proceeding." Although the Report accordingly recommended that the Commission's sanctions order not be summarily enforced, it stressed that this recommendation "does not mean that North Carolina faces no potential liability as a matter of law" with respect to the Plaintiffs' other claims in the bill of complaint.

Finally, the Report recommended that North Carolina's motion to dismiss the Complaint be granted to the extent that it urged that the Commis-

sion's sanctions order could not be enforced and that the Compact does not authorize the Commission to impose monetary sanctions. The Report recommended that the motion be denied, however, to the extent that it contended that the Plaintiffs were barred as a matter of law from seeking a judicial remedy beyond the remedies prescribed by the Compact. The Report concluded that further proceedings were necessary to determine whether North Carolina in fact breached its obligations under the Compact, whether North Carolina had any implied obligation under the Compact not to withdraw after being selected as a host State, and if so, when if ever such an obligation attached. The Report also concluded that further proceedings were necessary to evaluate the merits of the other claims that the Plaintiffs asserted in the bill of complaint. The Report stressed that "to the extent that the parties allege that North Carolina and the Commission entered into some kind of supplemental agreement outside the Compact, they may face a variety of legal and practical hurdles in seeking relief based on any such agreement." But the Report noted that, at that early stage of the proceedings, "no reason appears why such claims must be dismissed as a matter of law."

After the Special Master issued the Preliminary Report with respect to the parties' threshold motions, the parties agreed on a discovery schedule to be conducted over the next eighteen months. Before the parties had completed discovery pursuant to that schedule, however, they jointly requested that the Special Master establish a schedule for the filing

of dispositive motions for summary judgment based on their partial discovery to that point. The Special Master agreed, and the parties then filed cross-motions for summary judgment.

The Plaintiffs filed a motion for summary judgment on Count II of their bill of complaint. North Carolina filed a motion for summary judgment on all of the Plaintiffs' claims. The parties appeared before the Special Master to argue those motions. Following the argument, the Special Master requested supplemental briefing on several legal and factual questions that arose in connection with the pending motions. The parties filed supplemental briefs, responses, and replies to address these matters.

Although the Federal Rules of Civil Procedure are not strictly applicable in this original action, the Rules and the Court's precedents construing them are "useful guides" to the resolution of the parties' motions. *See Nebraska v. Wyoming*, 507 U.S. 584 (1993); Supreme Court Rule 17.2. Under Rule 56(c), summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." F.C.R.P. 56(c). When the non-moving party bears the burden of proof at trial, summary judgment is warranted if the non-moving party fails to "make a showing sufficient to establish the existence of an element essential to [its] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether a material factual dispute exists, the Court views the evidence

through the prism of the controlling legal standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Special Master concludes that these principles should guide his recommendations concerning the parties' motions for summary judgment.

For the reasons set forth below, the Special Master recommends that the Plaintiffs' motion be denied and that North Carolina's motion be granted in part and denied in part.

II. The Plaintiffs' Motion for Summary Judgment on Count II of the Bill of Complaint

The Plaintiffs seek summary judgment against North Carolina on Count II of the bill of complaint, which alleges that North Carolina breached the Compact. In their motion, the Plaintiffs argue that North Carolina breached the Compact in two ways. First, the Plaintiffs argue that North Carolina breached the Compact in December 1997 by ceasing all activities in pursuit of a license to build the second regional low-level radioactive waste disposal facility. They stress that North Carolina remained a party to the Compact for nineteen more months and therefore remained subject to its obligations under the Compact. Second, the Plaintiffs argue that North Carolina breached the implied covenant of good faith and fair dealing by withdrawing from the Compact in July 1999 "on the eve of the sanctions hearing the Commission had convened to address North Carolina's failure to fulfill its own obligations under the Compact." Pl. Mem. in Support of S.J. at 22-23.

North Carolina, in opposing the Plaintiffs' motion and by filing its own motion for summary judgment on Count II, *see* Part III, *infra*, argues that it fulfilled its obligation under the Compact to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Compact, Art. 5(C). In addition, North Carolina maintains that there is no dispute that it would have pursued the licensing process if the Commission had provided further funding. With respect to the Plaintiffs' second theory of breach, North Carolina argues that the express provision in the Compact permitting withdrawal precludes any claim that withdrawal could violate the implied covenant of good faith and fair dealing. In addition, North Carolina argues that, even if withdrawal could, under some circumstances, violate the implied covenant of good faith and fair dealing, the record does not reveal any evidence of bad faith in this case.

The Special Master recommends that the Plaintiffs' motion be denied because North Carolina did not breach the Compact by ceasing licensing activities for nineteen months before its withdrawal from the Compact and because North Carolina's withdrawal did not violate the implied covenant of good faith and fair dealing. Denial of the Plaintiffs' motion for summary judgment (and, as is explained below, grant of North Carolina's motion for summary judgment) on Count II does not necessarily mean that North Carolina faces no potential liability as a matter of law with respect to the Plaintiffs' other claims. *See* Part IV, *infra*.

A. Alleged Breach of Contract By Cessation of Licensing Activities

The Plaintiffs argue that North Carolina breached the Compact by ceasing all licensing activities on December 19, 1997, nineteen months before North Carolina formally withdrew from the Compact on July 26, 1999. The parties do not dispute that North Carolina did not take additional steps to pursue a license for a waste facility during that period. *See* Pl. Statement of Undisputed Material Facts ¶ 55 ("After Dec. 19, 1997, North Carolina took no further steps to license, site, or construct a facility."); Def. Statement of Material Facts Not in Dispute ¶¶ 67-70 (stating that as of December 19, 1997, North Carolina "was shutting down the project of siting and licensing a low-level radioactive disposal facility"). The parties do, however, dispute what specific actions North Carolina did take during those nineteen months, and the legal significance of those actions or omissions.

The Commission selected North Carolina to be the second host State for the region in September 1986. (South Carolina, which had a facility when it joined the Compact, was the first host State.) The North Carolina General Assembly responded by enacting legislation creating the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). The purpose of the Authority was to fulfill North Carolina's responsibilities under the Compact, while protecting the State's public health, safety, and environment. N.C. Gen. Stat. § 104G

(repealed effective July 1, 2000). Several provisions of the Compact are relevant to the present dispute.

First, Article 4(K) of the Compact provides in pertinent part that the "Commission shall not be responsible for any costs associated with . . . the creation of any facility." Compact, Art. 4(K). Second, Article 5(C) of the Compact provides that "[e]ach party state designated as a host state for a regional facility shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." *Id.*, Art. 5(C). Third, Article 7(G) of the Compact provides that "[s]ubject to the provisions of Article VII section (h), any party state may withdraw from this compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years." *Id.*, Art. 7(G). Article 7(H), added at the behest of North Carolina after it was chosen as the second host State, provides: "The right of a party state to withdraw pursuant to Article VII section (g) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress." *Id.*, Art. 7(H).

Notwithstanding these terms, it appears that the Southeast Compact was the weakest, in terms of the provisions for sanctions for recalcitrant states and for withdrawal, of all interstate compacts on radioactive waste created at this time. As noted in the

Preliminary Report, the only sanction that the Compact expressly authorizes the Commission to impose is the revocation of the membership in the Compact of a State that fails to fulfill its obligations under the Compact. Other compacts approved simultaneously by Congress, by contrast, empowered the compact entities to impose more draconian forms of sanctions. *See, e.g.*, Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. IV(I)(14), 99 Stat. 1915 (authorizing the compact commission to "impose sanctions, including but not limited to, fines, suspension of privileges and revocation of the membership of a party state"); Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(f), 99 Stat. 1891 (authorizing the compact commission to impose on a host State that withdraws before fulfilling its obligations "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal"); Central Interstate Low-Level Radioactive Waste Management Compact, Art. VII(e)(14), 99 Stat. 1870 (authorizing compact commission to require specific monetary payments as a sanction for non-compliance or failure to fulfill compact obligations).

The Southeast Compact also imposes fewer limits than do other contemporaneously approved compacts on the right of participating States to withdraw. As noted above, the Compact (at the urging of North Carolina after it was chosen as the second host state) expressly limits the right of States to withdraw only after the second host facility becomes operational. Other compacts, by contrast, im-

pose more stringent limits on the right of withdrawal.[2] *See, e.g.*, Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(i), 99 Stat. 1901 (providing for financial penalties for host States that withdraw before fulfilling their obligations); Central Interstate Low-Level Radioactive Waste Compact, Art. VII(d), 99 Stat. 1870 (delaying the effect of withdrawals for five years); Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1900 (same); Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. VII(h), 99 Stat. 1922 (same).

Given the Southeast Compact's relatively lax provisions governing the Commission's sanctioning authority and the participating States' right to withdraw, it is difficult to resist the conclusion that each of the participating States hoped to receive the benefit of being able to dispose of waste at a facility outside its borders, while avoiding the burdens of being the State selected to host the waste disposal facility.

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[2] The Southeast Compact was approved by Congress simultaneously with other regional compacts. The Plaintiffs stress that the drafters of the Southeast Compact did not closely consult the other compacts when they negotiated its terms. This Report compares and contrasts these compacts not to establish the specific intent of their respective drafters, but to ascertain how Congress would have understood the compacts when it enacted them into law. *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.'"). Accordingly, the Supreme Court has previously interpreted an interstate compact by comparing it to other "compacts, approved by Congress contemporaneously." *See Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

This is not to suggest that the Compact does not embody an enforceable bargain among the participating States; but the Compact seems clearly to have been designed to maximize the participating States' ability to extricate themselves from the arrangement if they had the misfortune of being chosen as the host State. Under such a regime, it would be surprising indeed if a facility were actually constructed without significant assistance from the States not selected as hosts or from the Commission, drawing on other sources of revenue.

To be sure, it is not clear that more stringent restrictions on withdrawal or more robust sanctioning power would have produced a different outcome; even the regional compacts with stronger terms ostensibly designed to ensure State participation did not ultimately produce new disposal facilities. Indeed, although Congress simultaneously approved seven regional interstate compacts in 1986 to deal with the disposal of low-level radioactive waste, *see* Omnibus Law-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859, none of these compacts has yet produced an operational low-level radioactive waste disposal facility. This appears to be in part because of the strong political and environmental obstacles to siting and licensing such facilities, and in part because of changes in the market and technology for the disposal of low-level radioactive waste.

This is the context in which the events giving rise to the present dispute took place. As noted above, although the Compact establishes that the Commission has no legal obligation to bear any of

the costs associated with the creation of a new facility, soon after being selected as the second host State North Carolina requested financial assistance from the Commission and indicated that it was unable or unwilling to bear the full cost of building a new facility. The Commission responded by adopting a resolution on Feb. 9, 1988, deeming "it appropriate and necessary to provide financial assistance to any state duly designated as the next host state for the initial planning and administrative costs and other pre-operational costs associated with that state's obligation to create and operate a regional facility." App. 63.

Beginning in Fiscal Year 1988 (July 1, 1987 – June 30, 1988) and continuing through Fiscal Year 1998 (July 1, 1997 – June 30, 1998), the Commission provided North Carolina with approximately $80 million in assistance. During the same period, North Carolina spent approximately $34 million of its own funds. The Commission's funds did not come from the party States. Rather, they were raised through surcharges and fees imposed on waste generators who used the Barnwell facility in South Carolina. The parties jointly provided the following year-by-year breakdown of the funds provided by the Commission and North Carolina. *See* Parties' Joint Supp. Fact Br. in Support of Mot. for S. J. (April 18, 2008), at 1.

FISCAL YEAR	COMMISSION FUNDS	NORTH CAROLINA FUNDS
1988	$200,000	$473,688
1989	$200,000	$2,467,160
1990	$1,015,914	$8,561,524
1991	$8,700,103	$7,281,097
1992	$11,199,561	$1,132,272
1993	$17,575,695	$2,215,442
1994	$12,069,397	$2,300,941
1995	$16,729,754	$2,264,566
1996	$3,166,000	$2,196,326
1997	$2,800,769	$2,145,691
1998	$6,260,347	$2,028,978
1999	$0	$531,923
2000	$0	$346,097
TOTAL	$79,917,540	$33,945,705

According to the parties, these funds were spent as follows: $94 million on site development,

$11 million on siting and licensing review efforts, $3 million on outside counsel to defend litigation, and $6 million by the Authority for salaries, benefits, and the cost of operations. *Id.* at 2.

Several key events help to put these expenditures in context. Early in the process, North Carolina defended and settled litigation over the location of the new facility. The State subsequently filed a license application for a proposed facility in Wake County in December 1993. On the basis of numerous concerns relating to health and safety, the State licensing authority declined to rule on the application at that time. North Carolina, with continuing financial assistance from the Commission, proceeded to hire consultants and experts in an attempt to address these concerns and obtain approval.

Apparently frustrated with the pace of the project, South Carolina exercised its right to withdraw from the Compact in July 1995, thereby depriving the Commission (and North Carolina) of further funding from fees assessed by the Barnwell facility. On January 5, 1996, the Commission informed North Carolina that it could no longer provide funds to assist with the development of the second facility. Pet. App. at 70a-74a. North Carolina responded that it was unwilling to assume a greater portion of the financial responsibility for the project than it had assumed to date. The Commission reversed its position and released additional funds to North Carolina during 1996 and 1997.

On December 1, 1997, the Commission again informed North Carolina that it would no longer provide funding for the project. North Carolina re-

sponded that without further financial assistance, it would be forced to commence an orderly shutdown of the project. The Authority's Business Plan, forwarded to the Commission on December 13, 1996, stated that "the total funds estimated to be required to reach the point at which a license can be issued (assuming a favorable decision) is $34 million." Parties' Joint Suppl. Fact Br. in Support of Mot. for S. J. (April 18, 2008), at 7. Furthermore, the best estimate at that time of the cost of constructing a facility, assuming the issuance of a license, was an additional $75 million. *Id.*

Because the Commission had only approximately $20 million on hand and North Carolina was not willing to assume a greater proportion of the costs, efforts to complete the licensing process essentially ceased at the end of 1997. North Carolina did, however, continue to fund the Authority for several years, maintain the project's records, and preserve the work done to date in the unlikely event that further funds became available. Finally, in July 1999, the North Carolina legislature voted to withdraw from the Compact. The Commission held a sanctions hearing in December 1999. The Commission unanimously found that North Carolina had failed to fulfill its obligations under the Compact, and it ordered North Carolina to repay all of the funds it had received from the Commission. North Carolina did not recognize the authority of the Commission, and this lawsuit followed.

At the outset, the Plaintiffs contend that the Court need not independently decide whether North Carolina took appropriate steps to ensure the licens-

ing of the facility, because the Commission resolved that question in its sanctions decision. According to the Plaintiffs, the Commission's determination is "conclusive" for purposes of this litigation. The Special Master finds this contention unpersuasive for the reasons previously set forth in the Preliminary Report. The best reading of the Compact is that the Commission lacks the power to impose monetary sanctions on member States. *See* Prelim. Report at 16-27. In addition, North Carolina withdrew from the Compact before the Commission purported to impose sanctions. *Id.* at 27-32. Thus, both the Plaintiffs and the Defendant remain free to press their interpretations of the Compact before the Special Master and, ultimately, before the Supreme Court.

In the alternative, the Plaintiffs argue that the Commission's decision finding that North Carolina breached the Compact is entitled to substantial deference. The Special Master finds this argument unpersuasive because the Constitution vests the Supreme Court with the authority to resolve disputes between States. The Court is composed of Justices with life tenure and salary protection, and the Constitution presupposes that judicial officers with these protections are in the best position to resolve disputes between States impartially. The Commission does not share these characteristics and cannot claim impartiality in this dispute. Indeed, it initiated this litigation and is currently a party to these proceedings. Under these circumstances, the Commission cannot be considered an independent and impartial decisionmaker. *Cf. Young v. U.S. ex*

rel. Vuitton et Fils, 481 U.S. 787 (1987). In addition, the Court has often observed that the Founders vested the Court with original jurisdiction in cases involving States in order to "match the dignity of the parties to the status of the court." *California v. Arizona*, 440 U.S. 59, 65-66 (1979); *accord Louisiana v. Texas*, 176 U.S. 1, 15 (1900); *Ames v. Kansas*, 111 U.S. 449, 464 (1884); *see also* The Federalist No. 81 (Hamilton) ("[I]n cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.") Accordingly, the question whether North Carolina fulfilled its obligation under the Compact to take "appropriate steps" towards licensing of a disposal facility is for the Court to resolve in the first instance without according deference to the Commission's interpretation.

Turning to this question, the Special Master concludes that North Carolina did not breach its obligation to take "appropriate steps" under the Compact. The Plaintiffs do not contend for purposes of the current motion that North Carolina failed to take appropriate steps to license a facility prior to December 1997. Rather, their contention is that by refusing after that time to assume the entire financial burden associated with licensing and building a facility, North Carolina failed to take appropriate steps and breached its obligations under the Compact.

At the outset, it is necessary to identify precisely the obligation at issue. Contrary to the Plaintiffs' occasional suggestions, the Compact does not impose an absolute obligation on the host State to

build a facility. Rather, it obligates the host State only to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Compact, Art. 5(C). In this case, the appropriate authority was the Division of Radiation Protection in the North Carolina Department of Environment, Health, and Natural Resources. A central issue, therefore, is whether North Carolina breached its obligation to take "appropriate steps" to secure a license from that agency. In the Special Master's view, the obligation in question is properly construed to be more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost.

In the Preliminary Report, the Special Master raised the question whether there was any supplemental agreement between North Carolina and the Commission that would have limited North Carolina's right to withdraw in exchange for financial assistance from the Commission. Both in their briefs and at the oral argument on the pending motions, the parties have now made clear that there was no such agreement. Rather, the Commission provided assistance merely to facilitate North Carolina's performance under the Compact and neither requested nor expected any additional performance. This fact is somewhat surprising given the amount of money the Commission provided over a decade. At any point, it could have made clear to North Carolina that further financial assistance was contingent upon amending the Compact to limit North Carolina's rights or augment its obligations.

Indeed, after being chosen as the second host State, North Carolina successfully sought an amendment to the Compact that it considered necessary to protect its interests as the second host State. The amendment provides that the "right of a party state to withdraw . . . shall terminate thirty days following the commencement of operation of the second host state disposal facility." Compact, Art. 7(H). The negative implication of this amendment is that party States (including North Carolina) remained free to withdraw prior to the opening of a second facility. South Carolina exercised this right in 1995, and North Carolina exercised it in 1999.

The question under the Compact, therefore, is whether North Carolina took appropriate steps to apply for and obtain a license while still a member of the Compact. The Special Master believes that the phrase "appropriate steps," as used in the Compact, is ambiguous. At a minimum, the adjective "appropriate" suggests that not all steps are required by the Compact. For example, a host State presumably would not violate the obligation to take appropriate steps by declining to locate the waste facility in the center of an urban area, rather than in an unpopulated area. Similarly, a host State likely would not violate the obligation to take appropriate steps by declining to seek a license for a facility that would operate in violation of State health and safety requirements. Cost is undoubtedly also relevant in assessing the obligation to take "appropriate steps." While the Compact might be construed to require the expenditure of $34 million to apply for a license, it is doubtful that it required the expenditure of $1

billion for this purpose. The Compact underscores the non-absolute nature of the obligations it imposes on party States by providing that "nothing in this compact shall be construed to infringe upon, limit or abridge" the rights enjoyed by sovereign States. Compact, Art. 3.

Given the inherent ambiguity in the phrase "appropriate steps" and the Compact's express reservation of the party States' sovereign rights, the Special Master believes that the meaning of the phrase may be informed by the parties' course of performance under the Compact. The course of performance suggests that North Carolina satisfied its obligation to take "appropriate steps." Soon after being selected as the second host State, North Carolina indicated that it could not bear the full financial burden of siting, licensing, and building a new facility. Accordingly, it repeatedly requested that the Commission provide substantial financial assistance. The Commission responded to these requests by providing such assistance through the end of 1997. The Commission's willingness to share the financial burden (even though it had no obligation to do so under the Compact) may be explained in part by the existence of the provision of the Compact giving North Carolina (and every other State) the right to withdraw from the Compact. This provision created the real possibility that North Carolina might withdraw from the Compact if the financial burden of being a host State proved too onerous.

Thus, in the first four years after North Carolina was selected, the Commission bore a smaller proportion of the costs (approximately $10 million)

than did North Carolina (approximately $18 million). As the magnitude of the project became clearer, however, the Commission assumed a greater proportion of the costs. Accordingly, during the next four years, the Commission contributed approximately $57 million, while North Carolina contributed approximately $8 million. At no point, however, did the Commission condition its assistance on a promise by North Carolina either to assume a greater share of the costs of the project in the future or to refrain from exercising its right to withdraw from the Compact.

This left the Commission in a difficult position when South Carolina withdrew from the Compact in 1995. To that point, fees assessed at the Barnwell facility had provided virtually all of the funds used by the Commission to finance the development of a second facility. In January 1996, the Commission informed North Carolina that it could no longer provide financial assistance, but reversed course when North Carolina refused to assume full responsibility for the project. In December 1997, the Commission informed North Carolina that it would not provide further funding. At this juncture, North Carolina declined to assume the entire financial burden of licensing a facility going forward, and considered proposals for alternative funding.

It is in light of this background that the Plaintiffs present their claim that North Carolina either repudiated or breached its Compact obligation to take "appropriate steps" by taking no steps to license a facility after December 1997. North Carolina counters that it fulfilled its obligation under the

Compact to take appropriate steps because the Compact did not require it to assume the full financial burden of licensing a facility and because it continued to fund the Authority and preserve the project for several years while seeking to resolve the funding impasse with the Commission. In North Carolina's view, it would have been futile (and therefore not "appropriate") to expend additional funds without a substitute for the Commission's contributions. Accordingly, North Carolina reduced its expenditures from an annual average of $2 million during the preceding six fiscal years to approximately $440,000 during the last two fiscal years of the project.

The Special Master believes that the Plaintiffs are not entitled to summary judgment on the basis of these events. Soon after being named a host state, North Carolina took the position that it could not bear the entire cost of siting and licensing a facility. Accordingly, the State provided substantial—but non-exclusive—funding for the project from 1987 through 1999. The Commission agreed early on that it was "appropriate and necessary to provide financial assistance" to the host state for initial planning and administrative costs. In addition, the Commission continued to provide financial assistance beyond the initial stages of the project—in much more substantial amounts than at the beginning of the process—until it ceased funding at the end of 1997. Even today, the Plaintiffs do not contend that North Carolina breached the Compact prior to December 1997 by refusing to assume the entire cost of obtaining a license for a new facility. If North Carolina's limited financial contributions satisfied its obligation

to take "appropriate steps" prior to 1998, then it is difficult to conclude that its refusal to assume an unlimited financial commitment going forward breached this obligation. To the contrary, the parties' course of performance suggests that North Carolina's continuing (albeit limited) financial contributions satisfied its obligation to take "appropriate steps" under the Compact.

This conclusion is strengthened by the fact that North Carolina could have exercised its right to withdraw from the Compact at an earlier time. As noted above (and discussed further in Part II.B, *infra*), the Compact's only express limitation on the party States' right to withdraw—in Article 7(h), which was added at North Carolina's request after it was chosen as the second host State—provides only that a party State cannot withdraw more than thirty days after the second host State's disposal facility commences operation, without unanimous consent of the other party States. Compact, Art. 7(H). There is, of course, no dispute that the disposal facility of the second host State (North Carolina) had not yet commenced operation at the time of North Carolina's withdrawal. If withdrawal by North Carolina in December 1997 (when the Commission ceased providing funding) or earlier would not have constituted a repudiation of the Compact or a breach of North Carolina's obligation to take "appropriate steps" to secure a license for a disposal facility, then it is difficult to see how its subsequent withdrawal, after continuing to provide funding sufficient to keep resumption of the licensing process a viable option, can constitute a repudiation or a breach of that obligation.

The Plaintiffs' claim—which essentially amounts to the narrow contention that North Carolina's failure to withdraw immediately upon deciding that it could not provide all of the requisite funds constituted a repudiation or a breach—cannot withstand scrutiny.

It is true that, after the Commission withdrew its assistance in 1997, North Carolina took the position that it could not complete the licensing process on its own and decreased its expenditures from approximately $2 million a year to approximately $440,000 a year. The Plaintiffs argue that, by taking these steps, North Carolina repudiated its obligations under the Compact. But these actions do not constitute repudiation. Repudiation occurs when an obligor either makes a statement to an obligee "indicating that the obligor will commit a breach that would itself give the obligee a claim for damages for total breach," Restatement (Second) of Contracts § 250(a) (1980), or performs "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Id.* § 250(b). North Carolina did not state that it intended to breach the Compact. To the contrary, North Carolina took the position that it was not obligated under the Compact to bear all of the costs associated with licensing a facility. Nor did North Carolina act in a way that rendered it unable to perform under the Compact. To the contrary, it continued to fund the Authority for almost two more years in the hope that alternative funding could be secured.

It might be argued that North Carolina at least should have maintained rather than reduced

its expenditure level until it withdrew from the Compact. This argument is not persuasive. The parties agree that, at the time the Commission withdrew its assistance, it would have taken at least $34 million to complete the steps necessary to obtain a license. Of course, there was no guarantee that these efforts would have been successful, and even more expenditures might have been needed to secure a license. And even if the license had been secured, construction of the facility would have required an additional, and substantial, expenditure of funds. Thus, even if North Carolina had continued to spend money at its previous rate prior to withdrawing from the Compact, it would have spent only a small fraction of the amount needed to reapply for a license.

Since North Carolina's obligation to take "appropriate steps" did not require it to expend $34 million, it did not require North Carolina to waste several million dollars while seeking alternative funding. Rather, under the circumstances, North Carolina's decision to fund the Authority and preserve the project until it withdrew constituted "appropriate steps" under the Compact. A contrary conclusion—that North Carolina was required to continue its expenditures at pre-1998 levels—would have created a perverse incentive for North Carolina to withdraw immediately in December 1997 to avoid breaching the Compact rather than to maintain the status quo and seek alternative funding. Under these circumstances, the Special Master believes that North Carolina's actions satisfied its obligation under the Compact to take "appropriate steps."

B. Alleged Breach of the Implied Covenant of Good Faith and Fair Dealing

The Plaintiffs also argue that North Carolina breached an implied covenant of good faith and fair dealing by withdrawing from the Compact "after inducing the other Party Sates to invest more than eleven years and $80 million in its effort to develop a regional waste disposal facility." Pl. Mem. in Support of S.J. at 22. The Plaintiffs thus argue both that the Court should hold that the duty of good faith and fair dealing applies to interstate compacts and that North Carolina's withdrawal "was the epitome of bad faith and unfair dealing." *Id.* at 23. Even assuming that the duty of good faith applies to interstate compacts, the record contains no evidence that North Carolina acted in bad faith.

First, it is not clear that the duty of good faith and fair dealing applies to compacts between sovereign States. Moreover, even if it applies, it is not clear that it applies in the same way as it does to private contracts. In ordinary contract cases, courts generally recognize that contracts impose a duty of good faith and fair dealing. *See* Restatement (Second) of Contracts § 205 (1980). The Supreme Court has not yet decided whether this Restatement provision applies to the enforcement of interstate compacts approved by Congress. Ordinarily, courts are reluctant to impose obligations on States or the federal government if they have not expressly agreed to be bound. This applies with special force in the context of interstate compacts. States employ such

compacts in their sovereign capacity to resolve conflicts or to enter into voluntary, cooperative arrangements. Reading implied obligations into interstate compacts might deter States from entering into such arrangements.

In addition, judicial imposition of compact terms beyond those for which the States have expressly bargained poses risks similar to those inherent in interpreting ambiguous federal statutes to impose obligations on States in areas, such as land use, in which the States have exercised "traditional and primary power." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). A similar clear statement requirement may be appropriate when interpreting interstate compacts. *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003)) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.'" (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). Although there may be some circumstances under which construing interstate compacts to include implied duties is warranted, considerations of federalism counsel caution in this regard.

Reading the standard duty of good faith into the Southeast Compact raises an additional concern in this case because several of the other regional compacts approved by Congress at the same time included express provisions to this effect. For example, the Central Compact provides that "[e]ach party state has the right to rely on the good faith perfor-

mance of each other party state."[3] Central Interstate Low-Level Radioactive Waste Compact, Art. III(f), 99 Stat. 1865. Similarly, both the Central Midwest Compact and the Midwest Compact provide that "[e]ach party state shall act in good faith in the performance of acts and courses of conduct which are intended to ensure the provision of facilities for regional availability and usage in a manner consistent with this compact." Central Midwest Interstate Low-Level Radioactive Waste Compact, Art. V(a), 99 Stat. 1886; Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. V(a), 99 Stat. 1897. The Supreme Court has explained that when a compact lacks features found in other compacts approved contemporaneously by Congress, courts "are not free to rewrite" the compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). Because Congress approved the Southeast Compact simultaneously with regional compacts containing express good faith requirements, courts should hesitate before reading a duty of good faith into the Southeast Compact.

Caution is especially appropriate in this case because the Plaintiffs would use an implied duty of good faith to limit North Carolina's express right to withdraw from the Compact. The Compact provides that "[a]ny party state may withdraw from the compact by enacting a law repealing the compact."

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[3] The Plaintiffs rely on *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528 (8th Cir. 2004), to support a duty of good faith under the Southeast Compact. *Entergy*, however, arose under the Central Interstate Low-Level Radioactive Waste Compact, which (unlike the Southeast Compact) contains an express provision obligating States to act in good faith.

Southeast Compact, Art. 7(G), 99 Stat. 1879. Unlike the Southeast Compact, other regional compacts approved by Congress specifically limit a party State's right to withdraw after being selected as a host State to build a disposal facility. For example, several compacts permit parties to withdraw but delay the effect of such withdrawals for five years. *See* Central Interstate Low-Level Radioactive Waste Compact, Art. VII(d), 99 Stat. 1870; Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1900; Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. VII(h), 99 Stat. 1922. The Southeast Compact places no such limitation on the right to withdraw.

In addition, the Midwest Compact provides a strong financial disincentive for host States to withdraw from the compact. A host State that withdraws "after 90 days and prior to fulfilling its obligations shall be assessed a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(i), 99 Stat. 1901. The Southeast Compact contains no similar restrictions on withdrawal. Courts should not lightly read such constraints into a compact approved by Congress on the very same day that it approved others containing express restrictions. *See Texas v. New Mexico*, 462 U.S. at 565.

There is another reason to question the Plaintiffs' assertion that the Southeast Compact contains implied restrictions on withdrawal. The Compact was subsequently amended (at North Carolina's re-

quest) to restrict withdrawal by member States, but this restriction was drafted to take effect only *after* a second disposal facility became operational. The negative implication of this amendment is that party States remain free to withdraw prior to that time. If the Commission or other party States had been concerned about the possibility that a host State (such as North Carolina or South Carolina) might withdraw, they could have proposed further amendments to restrict withdrawal. As the Compact stands, however, North Carolina (like South Carolina before it) was free to withdraw when it chose to do so.

Second, even assuming that a duty of good faith and fair dealing applies to the Southeast Compact, there is no evidence in the record that North Carolina breached any such duty. The current motion does not involve an allegation that North Carolina accepted millions of dollars from the Commission with no intent to seek or obtain a license, or that it denied a license for pretextual reasons. Nor does this case involve an allegation that North Carolina accepted Commission funds, secured a license, built a facility, and then immediately withdrew from the Compact before the other party States could make use of the disposal facility. Either course of conduct could very well constitute bad faith. *Cf. Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528 (8th Cir. 2004) (finding that Nebraska never intended to license a facility and used false reasons as a pretext to deny a site license). Although the Plaintiffs may prove otherwise after further discovery, the current record suggests that North Carolina worked diligently to obtain a license and did not withdraw until it

became clear that it would not have the requisite funds to seek and secure a license for the facility.

The Plaintiffs do not dispute that North Carolina spent approximately $34 million of its own funds in its efforts to site and license a new facility. Nor do they allege for purposes of this motion that North Carolina acted in bad faith by either misappropriating or misspending the $80 million in assistance it received from the Commission. To the contrary, the parties assume for purposes of this motion that the $114 million North Carolina expended on this project went toward legitimate and necessary business expenses such as site development, siting and licensing review efforts, outside counsel, and the cost of running the Authority. *See* Parties' Joint Supp. Fact Br. in Support of Mot. for S. J. (April 18, 2008), at 2. The Plaintiffs' allegation of bad faith at this point in the proceedings essentially rests on the undisputed facts that North Carolina received approximately $80 million from the Commission and withdrew from the Compact without obtaining a license to build a new facility. As discussed, however, the Compact did not impose an absolute obligation on North Carolina to license a facility. Rather, it obligated North Carolina to take appropriate steps to that end. The Special Master believes that North Carolina fulfilled this obligation and that the Plaintiffs have failed to produce any meaningful evidence that North Carolina violated the implied covenant of good faith and fair dealing.

Because the undisputed facts fail to demonstrate that North Carolina acted in bad faith or repudiated the Compact, the Plaintiffs are not entitled

to judgment as a matter of law on their claims that North Carolina breached the Compact. Accordingly, the Special Master recommends that their motion for summary judgment on Count II of the bill of complaint be denied.

III. North Carolina's Motion for Summary Judgment on Count II of the Bill of Complaint

For substantially the same reasons described above, the Special Master also recommends that North Carolina's motion for summary judgment on Count II of the Complaint be granted. As discussed, Count II alleges that North Carolina breached the Compact by failing to site, license, construct, and operate a regional low-level radioactive waste disposal facility. Based on the undisputed facts, the Special Master concludes that North Carolina satisfied its obligation while a member of the Compact to take "appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Compact, Art. 5(C).

From the time that it was designated a host State until December 1997, North Carolina worked consistently to site and license a facility. North Carolina established and funded the North Carolina Low-Level Radioactive Waste Management Authority. It defended and settled litigation challenging potential sites for the facility. After choosing a site, North Carolina applied for a license, but its application was deferred because of unresolved health and safety concerns. North Carolina continued to work

with outside consultants and experts to resolve these concerns until December 1997, when the Commission informed the State that it would no longer provide financial assistance.

Based on the parties' course of performance, North Carolina concluded that the Compact did not require it to assume the full remaining financial burden (at least an additional $34 million) of reapplying for a site license. Accordingly, North Carolina continued to fund the Authority and maintain the project records while attempting to find alternative sources of funding. By July 1999, it was clear not only that no additional funding was forthcoming from the Commission and the party States, but also that the Commission might seek to sanction North Carolina. Rather than face a sanctions hearing it considered to be unwarranted, North Carolina withdrew from the Compact. The Special Master believes that North Carolina satisfied its obligation under the Compact to take "appropriate steps" while it was a member of the Compact.

The Special Master also concludes that North Carolina's decision to withdraw from the Compact did not constitute a breach of contract. The Compact gives party States the unrestricted right to withdraw before a second disposal facility begins operations. As discussed, other regional compacts approved by Congress simultaneously with the Southeast Compact placed additional restrictions on withdrawal, particularly by host States. The Southeast Compact contains no such restrictions, and it would be problematic to read them into the Compact. *See Texas v. New Mexico*, 462 U.S. at 565.

The Plaintiffs argue that it would be unfair to permit North Carolina to withdraw from the Compact without successfully licensing or building a facility, especially in light of the fact that the State received approximately $80 million in financial assistance from the Commission toward these ends. The test of fairness, however, must be the Compact itself. The party States drafted and agreed to the Compact without knowing which State would be chosen as the second host State. The Southeast Compact, unlike other regional compacts, placed relatively few constraints on member States, including host States. Instead, the Compact relied primarily on the benefits of membership and possible future revenue to induce its members (including host States) to remain in the Compact and produce new facilities. Based on the more restrictive language found in other compacts, one might have predicted that these incentives would prove to be inadequate. Certainly in hindsight, these incentives failed to keep either South Carolina or North Carolina from withdrawing (even after the latter spent approximately $34 million of its own funds to develop a new site). The remedy for this deficiency, however, is not a judicial reformation of the Compact, but rather voluntary amendment by the party States with the approval of Congress.

Given the terms of the Southeast Compact, it is not surprising that North Carolina withdrew in 1999 before successfully licensing and building a new facility. Once South Carolina withdrew in 1995, the Commission lacked a ready source of new resources to assist North Carolina with the substantial

expense of licensing and building a new facility. In addition, the financial incentives changed after 1995. If North Carolina had chosen to finance the facility itself, it would have been much more difficult to recoup its costs within a reasonable period. To avoid these events, the Southeast Compact could have placed greater restrictions on the ability of host States to withdraw. Had it done so, South Carolina and North Carolina might have remained in the Compact, the Commission would have maintained a reliable source of revenue to assist host States with the development of new facilities, and the region would have had a smoother transition from one facility to the next.

Indeed, some compacts took steps to deter withdrawal. As noted, both the Central Midwest Compact and the Midwest Compact restrict the ability of a designated host State to withdraw after 90 days by permitting the Commission to assess "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Central Midwest Interstate Low-Level Radioactive Waste Compact, Art. VII(f), 99 Stat. 1891; Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(i), 99 Stat. 1901. Even these provisions, however, were not enough to produce a new facility. Indeed, not a single new disposal facility has opened since Congress approved the regional compacts in 1986.

The events relating to the Midwest Compact are instructive. In 1987, the Midwest Commission selected Michigan as a host State because it was the

greatest producer of low-level radioactive waste. *See* Wayne E. Kiefer, *Low-Level Radioactive Waste Issues in Michigan: 1980-2000*, 33 Michigan Academician 343 (2002). Michigan faced great opposition at home to developing a facility. After rejecting several sites, the State adopted restrictive criteria that the Commission believed would make it impossible to find an appropriate site. *Id.* The Commission thereafter refused to advance any additional financial assistance to Michigan, and in July 1991 the Midwest Compact voted to revoke Michigan's membership in the compact. *Id.* The need to develop a regional disposal facility abated in July 1995 when South Carolina withdrew from the Southeast Compact and immediately reopened the Barnwell facility to all States other than North Carolina. *Id.*

In light of these events, some members of the Midwest Compact sought to strengthen the compact by proposing amendments to govern host States and funding. For example, Minnesota has sought to modify the compact by adopting, in its own statutory law, a revised version of the compact that obligates the Commission to "[p]rovide a host state with funds necessary to pay reasonable development expenses incurred by the host state after it is designated to host a compact facility." Minn. Stat. § 116C.831 (2008). The amendments also authorize alternative mechanisms to raise such funds. "When no compact facility is operating, the Commission may assess fees to be collected from generators of waste in the region." *Id.* "When a compact facility is operating, funding for the Commission shall be provided through a surcharge collected by the host state . . . ."

Id. A host State's obligation to develop and operate a facility is expressly made contingent upon the discharge by the Commission of its obligation to provide funding. *Id.* The amended compact further specifies that a host State relieved of its responsibilities "shall repay the Commission any funds provided to that state by the Commission for the development of a compact facility." *Id.* In addition, a host State relieved of its responsibilities "shall pay to the Commission the amount the Commission determines is necessary to ensure that the Commission and the other party states do not incur financial loss as a result of the state being relieved of its host state responsibility." *Id.* Although Congress does not yet appear to have approved amendments to the Midwest Compact, Minnesota's actions both reveal the difficulties of interstate efforts to create facilities for the disposal of low-level radioactive waste and suggest that the States are capable of drafting compact language to provide incentives for States to remain fully invested in those efforts.

Had the Southeast Compact contained provisions of this kind, the Plaintiffs' claims would have more merit. As written, however, the Compact merely imposed an obligation on host States to take "appropriate steps" to license a facility, placed no restrictions on the ability of a host State to withdraw, and did not obligate a host State to repay financial assistance from the Commission if it was ejected or withdrew from the Compact. Under these circumstances, the Special Master recommends that North Carolina's motion for summary judgment with respect to Count II of the bill of complaint be granted.

IV. North Carolina's Motion for Summary Judgment on Counts III-V of the Bill of Complaint

North Carolina has moved for summary judgment with respect to Counts III, IV, and V of the bill of complaint, which seek relief based on claims of unjust enrichment, promissory estoppel, and money had and received. The Plaintiffs have not moved for summary judgment on these claims because they believe that they are fact intensive and require additional discovery. The Special Master believes that resolution of North Carolina's motion on these claims requires further briefing and argument, and possibly further discovery. Because Counts III, IV, and V seek relief as an alternative to recovery for breach of contract under Count II, however, the Special Master does not think it is advisable to delay the filing of his Report. If the Court accepts the Special Master's recommendations with respect to Count II, then the parties can revisit Counts III, IV, and V in future proceedings. If the Court rejects the Special Master's recommendations regarding Count II, then there may be no need to consider Counts III, IV, and V.

Counts III-V cannot be resolved now. A threshold question is whether the claims at issue in Counts III–V belong to the Commission, the Plaintiff States, or both. If the claims belong exclusively to the Commission, then sovereign immunity may shield North Carolina from these claims. *See* Prelim. Rpt. at 4-14. The Compact provides that the Commission "is a legal entity separate and distinct

from the party states capable of acting in its own behalf and is liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states." Compact, Art. 4(M), 99 Stat. 1877. It is undisputed that the Commission, rather than the party States themselves, provided North Carolina with approximately $80 million in financial assistance. But for sovereign immunity, the Commission itself could sue North Carolina to recover these funds.

In this case, the Commission has joined with the party States to sue North Carolina. To the extent that the Plaintiff States themselves are entitled to bring these claims, the Eleventh Amendment poses no barrier in this original action between States. See *Texas v. New Mexico*, 482 U.S. 124, 130 (1987) ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State."); *Arizona v. California*, 460 U.S. 605 (1983). Thus, the question here is whether the Plaintiff States are entitled to pursue the claims asserted in Counts III-V on behalf of the Commission. There is no doubt that the Plaintiff States can sue North Carolina for breach of the Compact, as they are parties to the Compact. The claims asserted in Counts III-V, however, appear to belong exclusively to the Commission, since it provided the funds at issue. It is possible that the Plaintiff States may sue *parens patriae* to restore the funds to the Commission, but the parties have not adequately

briefed this issue, and its resolution in this case is unclear. *Cf. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., concurring) (stating that "where one State brings a suit *parens patriae* against another *State*, a more circumspect inquiry may be required in order to ensure that the provisions of the Eleventh Amendment are not being too easily circumvented by the device of the State's bringing suit on behalf of some private party"); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900) (stating that in order to maintain original jurisdiction, "it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals); *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (holding that "one State cannot create a controversy with another State . . . by assuming the prosecution of debts owing by the other State to its citizens").

In the course of briefing North Carolina's summary judgment motion, the parties raised several subsidiary questions. One is whether North Carolina law or federal common law governs the claims asserted in Counts III-V. North Carolina argues that its law should govern because these claims arise outside the Compact. While the Compact partakes of federal law, it argues, the claims asserted in Counts III-V necessarily arise under state law. The Plaintiffs counter that all disputes between States are governed by federal common law because States are entitled to equality of right under the Constitution, a principle that precludes the application here

of one State's law in preference to another's. Resolution of this question may turn on whether the claims are properly viewed as a dispute between States, as the Plaintiffs maintain, or instead as a dispute between the Commission and North Carolina, as North Carolina maintains. In disputes between States, the Court ordinarily applies federal common law designed to respect the equality of States. The rationale for applying federal common law is less compelling if the claims arise solely between the *Commission* and North Carolina.

Apart from the problems of sovereign immunity and choice of law, summary judgment on Counts III, IV, and V appears to be premature because several factual and legal questions remain to be decided. While the existence of the Compact does not appear to preclude an independent claim of promissory estoppel, the parties dispute whether North Carolina made an enforceable promise and what the precise content of any such promise might have been. The parties also dispute whether the Commission and/or the party States reasonably relied on any such promise. More fundamentally, there is a question whether promissory estoppel is an appropriate basis for recovery against a State. Any promise North Carolina made arose in the context of an interstate compact approved by Congress. It is unclear whether and to what extent the Constitution permits States to make and enforce promises outside the formalities of the Compact Clause.

Questions also remain regarding the Plaintiffs' claims for unjust enrichment and restitution. North Carolina denies that it received a benefit or

was enriched, because it spent all of the funds that it received on appropriate efforts to license a facility. Similarly, North Carolina claims that, in any event, there was no "unjust" enrichment, because the funds it received did not take the place of, but merely augmented, the state funds that it spent on the project. Unjust enrichment is more typically used to recover money paid by mistake.

In light of these legal and factual questions, the Special Master will defer consideration of North Carolina's motion for summary judgment with respect to Counts III, IV, and V. At a minimum, resolution of this motion would require further briefing and argument, and perhaps further discovery. Because further proceedings would delay the Court's consideration of this case and because the Plaintiffs assert the claims in Counts III-V only as an alternative to their claims for breach of contract, the Special Master recommends that North Carolina's motion for summary judgment on Counts III-V be denied at this time.

V. Restitution as a Measure of Damages

As a remedy for breach of contract, the Plaintiffs seek restitution of the approximately $80 million that the Commission provided to North Carolina from 1987 to 1997. As explained above, the Special Master recommends that the Court find that North Carolina has not breached the Compact. Accordingly, it is not necessary to resolve whether the Plaintiffs would be entitled to restitution of $80 million if North Carolina were found to have breached the Compact.

The Special Master notes, however, that the Plaintiffs' demand for restitution raises several complex issues. At the outset, one must distinguish between the equitable claim of restitution as a theory of *recovery* (as alleged in Counts III and V of the Complaint) and restitution as a *measure of damages* for a breach of contract (as alleged in Count II of the Complaint). *Compare* Restatement of the Law of Restitution § 1 (1937) (concerning the equitable claim of restitution for unjust enrichment), *with* Restatement (Second) of Contracts § 373 (1980) (concerning restitution as a measure of damages for breach of contract). The following discussion addresses issues relating to restitution as a measure of damages.

A threshold issue is whether the Plaintiffs may elect restitution as a remedy without first showing that expectation damages are either unavailable or inadequate. The Plaintiffs maintain that they may elect restitution as a remedy, while North Carolina argues that restitution is appropriate only when damages are inadequate.

Another issue is whether the Plaintiff States or instead only the Commission may seek restitution. Resolution of this question may affect whether North Carolina may assert Eleventh Amendment immunity to bar recovery. The Plaintiff States concede that the Commission rather than the States themselves provided the funds in question, but they argue that the States may seek restitution, for two principal reasons. First, they argue that the funds raised by the Commission through fees and surcharges should be considered contributions by the

States within the meaning of the Compact. Second, they argue that the Commission was acting as the States' agent when it provided the funds in question to North Carolina. North Carolina disputes both of these propositions and argues that only the Commission may seek restitution because it provided the funds at issue. In the course of these proceedings, the Special Master has also asked whether the Plaintiff States may seek to have restitution paid to the Commission rather than to the States themselves. If available, this approach might avoid some of the difficulties posed by the alternatives.

Finally, even if restitution is available as a measure of damages for the alleged breach of contract in this case, several complex questions will arise relating to the appropriate measure of restitution. First, if the basis for a finding that North Carolina breached the Compact is that it failed to take appropriate steps for the 19 months prior to its withdrawal—a claim that the Special Master recommended above be rejected—then are the Plaintiffs entitled to full restitution of all funds provided by the Commission from 1988 through 1997, or merely an amount to compensate them for North Carolina's inaction in the final nineteen months?

Second, if the Plaintiff States are entitled to seek restitution, should any recovery be reduced because fewer than all of the member States have chosen to sue? The Southeast Compact originally consisted of eight States: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Only four of these States are plaintiffs in this case. Georgia and Mississippi chose

not to join as plaintiffs. North Carolina is the Defendant and withdrew from the Compact in 1999. South Carolina is neither a plaintiff nor a defendant and withdrew from the Compact in 1995. Should restitution be adjusted on any of these bases?

As noted above, these questions need not be resolved at present in light of the Special Master's recommendation that North Carolina's motion for summary judgment be granted with respect to Count II of the bill of complaint.

VI. Conclusion

The Special Master recommends that the Plaintiffs' motion for summary judgment be denied, and that North Carolina's motion for summary judgment be granted with respect to Count II of the bill of complaint and denied with respect to Counts III-V of the bill of complaint.

This case is currently in an interlocutory position. For the reasons given above, the Special Master has determined that the case must proceed with further discovery and possibly a trial before Counts III-V can be completely resolved. The Special Master, however, has decided to file both his Preliminary Report and his Second Report now because he believes that an immediate decision by the Supreme Court may materially advance the ultimate termination of the litigation by narrowing the scope of any future discovery and trial. *Cf.* 28 U.S.C. § 1292(b) (permitting interlocutory appeals from district courts to courts of appeal under somewhat analogous circumstances).

It may assist the Supreme Court for the Special Master briefly to explain the procedural consequences of actions that the Court might take at this juncture. If the Court accepts the Special Master's recommendations, proceedings before the Special Master would continue with respect to Counts III, IV, and V. Alternatively, if the Supreme Court rejects one or more of the Special Master's recommendations, the Court might direct the Special Master to take further actions in the case, such as determining what remedy to award the Plaintiffs on Count II or how to address the remaining Counts of the complaint. Finally, the Court may decide to take no action on either the Preliminary Report or the Second Report at this juncture, much as a court of appeals might deny a discretionary interlocutory appeal. In that case, proceedings before the Special Master would continue, and the Supreme Court would have the opportunity to review the issues in the reports when the Special Master files a final report.

Respectfully submitted,

BRADFORD R. CLARK
Special Master

2000 H Street, NW
Washington, D.C.
Ph. (202) 994-2073
Specialmaster132@law.gwu.edu

April 2, 2009

No. 132, ORIGINAL

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary Report and the Second Report of the Special Master

EXCEPTIONS OF THE STATE OF NORTH CAROLINA TO THE REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

June 2009

**Counsel of Record*

EXCEPTIONS TO THE PRELIMINARY REPORT AND THE SECOND REPORT OF THE SPECIAL MASTER

The State of North Carolina, takes exception to the following conclusions of the Special Master:

1. The recommended denial of North Carolina's motion to dismiss all claims brought by plaintiff Southeast Interstate Low-Level Radioactive Waste Management Commission. Under both the Eleventh Amendment and common-law sovereign immunity principles, only the United States or a sister State may sue a non-consenting State in federal court, absent a valid congressional abrogation of the State's sovereign immunity. Because North Carolina has not waived, and Congress has not abrogated, North Carolina's sovereign immunity from suit by the Commission, the Commission's claims cannot proceed in this Court. In this case, this Court has jurisdiction only over the claims asserted by the plaintiff States. Contrary to the Special Master's recommendation, North Carolina's motion to dismiss the Commission's claims should be granted.

2. The failure to recommend granting North Carolina's motion for summary judgment on the quasi-contract claims asserted in Counts III, IV, and V of the Bill of Complaint. It is a settled common-law rule that where the parties' relationship concerning a given subject matter is governed by the terms of an express contract, no equitable claim will lie in addition a claim for breach of contract. The Special Master declined to address North Carolina's motion at this stage in the proceedings, but the motion is legally and factually ripe for adjudication, and should be granted.

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INTRODUCTION

Pursuant to an agreement with other States memorialized in a formal interstate Compact approved by Congress, North Carolina tried unsuccessfully to site and license a facility within the State for the disposal of low-level radioactive waste. North Carolina spent over $30 million of its own taxpayers' money in its lengthy effort to conduct the proper environmental studies and obtain the necessary approvals for the facility. None of the other States spent any money of their own to assist North Carolina's efforts. However, over time North Carolina did receive financial assistance from fees and surcharges collected from private waste generators by the Commission established to oversee operation of the Compact. That financial assistance amounted to almost $80 million. After years of development efforts, however, the Commission declined to provide further funding, and North Carolina determined that its taxpayers could not alone bear the enormous costs still remaining to study and develop the site. Threatened with punitive sanctions by the Commission, North Carolina exercised its explicit, unambiguous right to withdraw from the Compact.

The Commission and several (but not all) of the member States to the Compact have now sued North Carolina under the original jurisdiction of this Court. They allege that North Carolina breached its obligations under the Compact by failing to construct a facility before withdrawing from the Compact, and they seek (a) return to the Commission of the private generator surcharge and fee funds provided to North Carolina over the years to assist in site development, and (b) whatever damages the States themselves

suffered as a result of North Carolina's failure ultimately to construct a regional disposal facility. But as the Special Master determined, the undisputed record establishes that North Carolina engaged in appropriate, good-faith efforts to site, license, and develop a facility while it was a member of the Compact. The Compact requires no more. North Carolina could have exercised its contractual right to withdraw at any time, but instead chose to spend millions of dollars in its efforts - albeit ultimately futile - to achieve the Compact's objective. The fact that the Commission chose, for its own reasons, to provide financial assistance derived from private-generator fees and surcharges has nothing to do with the question whether North Carolina fulfilled the obligations of a designated host state while it was a member of the Compact - not an obligation to construct a facility, but an obligation to *try* in good faith to construct a facility. This it did, and there is no evidence to the contrary. There is therefore no breach of the Compact, as the Special Master correctly determined.

The Special Master's erred in declining to go further and recommend a complete judgment in North Carolina's favor in this action. Contrary to the Special Master's reports, this Court lacks jurisdiction over the claims of the plaintiff Commission, because under the Eleventh Amendment and common-law sovereign immunity principles, a non-consenting State may be sued in this Court only by the United States or a sister State, and the Commission is neither. And while the Special Master correctly determined that North Carolina is entitled to judgment on the two contract-

based counts, he should have also recommended judgment for North Carolina on the remaining, quasi-contract claims, because such claims cannot be asserted as a matter of law where, as here, an express contract already governs the parties' relationship.

STATEMENT

A. The Party States And Congress Enact The Compact.

The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was enacted by each of the eight original member states and consented to by the United States Congress on January 15, 1986 in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act. Pub. L. No. 99-240, Title II, 99 Stat. 1859 (1986).[1] The Act provides congressional consent to seven separate regional compacts involving a total of 44 states. None of these contemporaneously-enacted compacts has resulted in the creation of an operational low-level radioactive waste disposal facility.

North Carolina joined the Compact as a party state pursuant to a statute enacted in 1983 by the North Carolina General Assembly. N.C. Gen. Stat. § 104F-1

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[1] The original party states were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina Tennessee and Virginia. South Carolina withdrew from the Compact in 1995. North Carolina withdrew in 1999. (A copy of the Compact as amended is attached hereto as Appendix 1a - 28a.)

(repealed effective July 22, 1999). The Compact declared its policy to establish the instrument and framework for a cooperative effort to provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, while distributing the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states. Compact, Article 1.

The Compact created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission") and provided it with specific duties and powers to carry out the purposes of the Compact. Compact, Article 4. The Commission is composed of two voting members appointed by each party state. Compact, Article 4(A). A primary duty of the Commission was the identification of a host state for development of a second regional disposal facility and to "ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991." Compact, Article 4(E)6. The Compact declared that the pre-existing facility located in Barnwell, South Carolina was not to serve as the regional disposal facility beyond December 31, 1992. Compact, Article 2(10).

The Compact expressly provided that each party state retained all elements of its sovereignty and that nothing in the Compact would be construed to "infringe upon, limit or abridge those rights." Compact, Article 3. The party states further agreed that nothing in the Compact would serve to "[a]lter the relations between, and the respective internal responsibilities of, the government of a party state and

its subdivisions" or "[a]ffect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders." Compact, Article 6(A)7., 9.

The Commission selected North Carolina as the second host state in September 1986. In response, the North Carolina General Assembly enacted legislation in August 1987 creating the Low-Level Radioactive Waste Management Authority (the "Authority") for the purpose of fulfilling its responsibilities under federal law and the Compact, while protecting public health, safety and the environment. N.C. Gen. Stat. § 104G (repealed effective July 1, 2000). North Carolina also initiated the enactment of an amendment to the Compact altering the parties' withdrawal rights. The original withdrawal clause provided that "any party state may withdraw" from the Compact so long as any regional disposal facility already located within the state remained available to the region for four years after withdrawal. Compact, Article 7(G). The North Carolina statute establishing its Authority provided that North Carolina would exercise its right to withdraw from the Compact unless every party state agreed to, and Congress approved, an amendment to that provision terminating the right of a party state to withdraw from the Compact thirty days following the commencement of operation of the second host state disposal facility. 1987 N.C. Session Laws Chapter 850, section 25. The other party states agreed, and in 1989 Congress approved the amendment adding the withdrawal limitation in a new Article 7(H). *See Southeast Interstate Low-Level Radioactive Waste*

Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, 103 Stat. 1289 (1989).

B. North Carolina Attempts To Site And License A Facility.

Pursuant to North Carolina's designation as host state, the Authority initiated the complex, expensive, and lengthy process of engaging consultants and contractors necessary to move forward with site selection, licensing, and eventual construction of a disposal facility. In 1989, the Authority's consultants and contractors reviewed 21 potential sites, resulting in the identification of four favorable locations. In 1990, further investigation narrowed the possibilities to two sites - one in Richmond County and another located along the Wake/Chatham county line. But both Richmond and Chatham Counties immediately filed lawsuits to enjoin any potential facility development in those locations. Those actions, including appeals, proceeded for more than three years. In November 1993 the North Carolina Supreme Court ruled that the trial courts in those counties could not preliminarily enjoin the Authority's site selection process. *See Richmond County v. North Carolina Low Level Radioactive Waste Mgmt. Auth.*, 436 S.E.2d 113 (N.C. 1993). Additionally, the State of South Carolina enacted legislation in 1992 requiring that the Barnwell facility be closed to North Carolina generators if North Carolina selected the Richmond County site. S.C. Code Regs. 48-48-80 (amended effective June 16, 1992).

In December 1993 the Authority identified the Wake County site as the preferred site. Soon thereafter, the Authority's primary contractor, Chem-Nuclear Systems, Inc. ("Chem-Nuclear"), submitted an application to the State's licensing authority, the Division of Radiation Protection in the Department of Environment, Health, and Natural Resources ("DRP"). Def. App. 159a. DRP is the designated state entity responsible for administration of North Carolina's radiation protection program, with specific responsibility for the process of licensing low-level radioactive waste facilities. N.C. Gen. Stat. § 104E (1999). DRP's rigorous review of the license application resulted in an initial submission of 38 interrogatories to Chem-Nuclear in March 1994 designed to clarify concerns about the complex geology and hydrology of the site, as well as various modeling and monitoring issues that had already been raised informally. Def. App. 160a. Ultimately, DRP submitted 594 interrogatories to Chem-Nuclear concerning identifying major health and safety issues that required resolution prior to the licensing of the proposed Wake County site. Def. App. 160a.

In July 1994 DRP issued a revised schedule estimating that the license review and approval process would not be completed until June 1996. Pl. App. 160-68. In January 1995 the Authority informed the Commission that field tests and design work calculations necessary to respond to DRP's interrogatories would take additional time, meaning that the potential license issuance date would be the summer of 1997, and that the facility could not be open until 1998. Pl. App. 169-75.

In January 1996 Chem-Nuclear issued a comprehensive site assessment plan acknowledging deficiencies during the testing and review process and, in turn, the Authority issued a "Licensing Work Plan" on May 31, 1996 which included a series of "Decision Points" with a targeted date for the completion of the licensing review process and a licensing decision in early 2000. Joint Supp. Fact Br. App. 67-134. In July 1997, however, DRP reported that a new geologic discovery of groundwater discharge at the site would materially affect license approval by requiring the facility to be reconfigured from existing plans. Def. App. 165a. By November 1997 the Authority believed it had satisfied the criteria specified in Decision Point 1 and could continue with site development. Def. App. 16a. The Commission, however, shortly thereafter announced that it would no longer provide financial assistance to support the Authority's site development efforts.

C. Commission Funding Assistance Is Recognized By All As Necessary From The Outset.

The Compact provides for the Commission to receive operational funding, consisting of an initial $25,000 payment made by each party state, together with revenues resulting from special fees or surcharges levied by the host state on users disposing waste at a regional facility. Compact, Article 4(H). The pre-existing licensed disposal facility located in Barnwell County, South Carolina was subject to the Commission's authority for the imposition of such fees and surcharges. Compact, Article 2(10); 7(H).

Responsibility for funding the development of a second disposal facility is not explicitly addressed in the Compact. Article 4 does make clear the Commission itself is not *required* by the Compact to provide the funding: the "Commission shall not be responsible for any costs associated with ... the creation of any facility." Compact, Article 4(K). But neither does the Compact obligate the host state to construct a facility *no matter the cost*. Rather, Article 5(C), the Compact provision addressing development and operation of facilities, provides only that "[e]ach party state designated as a host state for a regional facility shall take *appropriate steps* to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority" (emphasis added).

The provision of funding to pay for the Authority's efforts to site and license a North Carolina facility was a critical issue from the very outset of the process. In a Resolution adopted February 9, 1988, the Commission determined that it would be "appropriate and necessary" to provide financial assistance to "any state" developing the second disposal facility. Pl. App. 63. The Commission thus authorized the use of its "State Assistance Trust Fund" for "the initial planning and administrative costs and other pre-operational costs associated with [North Carolina's] obligation to create and operate a regional facility." *Id.* Throughout the next decade, the Commission raised substantial revenue by imposing and collecting various surcharges and fees on waste generators utilizing the Barnwell disposal facility in South Carolina, and used those revenues to defray a substantial portion of the

costs associated with North Carolina's efforts to site and license a disposal facility.

For instance, in 1989 the Commission instituted a "Capacity Assurance Charge" on all southeast waste generators using the Barnwell facility for the purpose of creating funds "to support the licensing phase of North Carolina's site development." Pl. App. 71.[2] In September 1992 the Commission established an out-of-region access fee on waste disposed of at the Barnwell facility. Pl. App. 123-42. Subsequently, the Commission found that it "must take appropriate action to furnish additional funds for use" by the Authority in support of the licensing phase of site development and, in November 1992, established an access fee on regional waste "at a rate sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993 - December 31, 1995." Def. App. 87a.

The member States did not provide any of the funds distributed by the Commission to North Carolina. The surcharges and fees paid by waste generators using the Barnwell disposal facility in South Carolina were the source of all monies provided by the Commission to North Carolina for use in the facility licensing process. Def. App. 153a. From 1988 through 1998, the Commission provided North

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[2] Information available at that time indicated that "[t]he total of all projected expenditures from the first anticipated date of receiving Capacity Assurance funds in April 1990, through the receipt of the license on December 31, 1991 is approximately $21,000,000." Pl. App. 74.

Carolina with approximately $80 million in such assistance, while North Carolina expended approximately $34 million of its own funds in its efforts to site and license a disposal facility. Joint Supp. Fact Br. 1-2.

D. South Carolina Withdraws From The Compact And Removes The Commission's Funding Source.

The Commission's practice of providing North Carolina financial assistance from fees and surcharges collected from private generators at the Barnwell facility continued without interruption until July 1995. At that time South Carolina withdrew from the Compact and closed the Barnwell facility to generators from North Carolina.[3] As a result of South Carolina's withdrawal from the Compact, the Commission lost the use of the Barnwell disposal facility as a means of generating revenue. Accordingly, on January 5, 1996, the Commission notified North Carolina that future funds would not be available to assist in the development of the second regional disposal facility. Joint Supp. Fact Br. App. 1-3.

In response, North Carolina Governor James B. Hunt advised the Commission that the Compact agreement contemplated an equitable distribution of

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[3] Effective July 1, 2000, South Carolina joined the Atlantic Interstate Low-level Radioactive Waste Compact and repealed the ban on low-level radioactive waste shipments to the Barnwell disposal facility from generators located in North Carolina.

costs and reminded its Chairman that North Carolina had already contributed $30 million of state funds for the facility, while none of the other party states had directly provided any money beyond their original $25,000 contribution. Joint Supp. Fact Br. App. 11-12. On June 14, 1996, Governor Hunt informed the Commission that while "North Carolina shares an interest with the Commission and the other party states" in seeing that a regional disposal facility was licensed, "North Carolina is not prepared to assume a greater portion of the project costs" than it had done to date. Joint Supp. Fact Br. App. 17-18.

In October 1996 the Commission adopted a Resolution declaring that it was "willing and able to provide funds to support site development in North Carolina" (Pl. App. 240), and thereafter did provide funds in 1996 and 1997 for the implementation of the Licensing Work Plan, allowing North Carolina to continue its progression toward a licensing decision. *See* Oct. 3, 1996 Minutes, Southeast Compact Commission (Pl. App. 247-52); Apr. 18, 1997 Minutes, Southeast Compact Commission (Pl. App. 269-74); Aug. 21, 1997 Minutes, Southeast Compact Commission (Pl. App. 281-88).

In December 1996 the Authority promulgated a business plan to define future financial needs and potential options for satisfying such needs, estimating that an additional $34 million was needed to reach the point at which a license could be issued and assuming that $7 million of that requirement would be funded by North Carolina. Joint Supp. Fact Br. App. 135-48. Subsequently, in August 1997 the Commission

"agree[d] in principle" with a Memorandum of Understanding drafted by a regional electric utility generators group, and requested that North Carolina consider the proposed MOU "as a mechanism to address" license funding shortfalls and construction funding. Pl. App. 284. On November 3, 1997, North Carolina's Governor responded to the proposed MOU, which contemplated a loan from the utilities group of up to $7 million to the Authority in exchange for preferential rates and the ability to export waste out of the compact region, by conveying his conclusion that it was "doubtful that the practical, as well as legal, commitments envisioned would be approved by all the affected agencies and governmental bodies." Joint Supp. Fact Br. App. 43-44.

F. The Commission Terminates Funding And North Carolina Withdraws from the Compact.

On December 1, 1997, the Commission informed the Authority that it was terminating future funding assistance for the project. Joint Supp. Fact Br. App. 49. The Commission had end-of-year cash balances exceeding $22 million in fiscal years 1997, 1998, and 1999. Pl. App. 208-09. The Authority responded to the funding cut off by indicating that the Commission's action left "no alternative but to commence the orderly shutdown of the project." Joint Supp. Fact Br. App. 53.

North Carolina continued to fund the Authority in 1998 and 1999, taking steps to protect the proposed site and to preserve the work that had been performed

up to that point, in the hope that the project could pick up where it left off upon the resumption of funding by the Commission. Miller Aff. ¶4, Def. Supp. App. 131; 133. In 1998 the Commission reiterated the importance of reaching a mutual resolution of the funding issue and expressly promised "to work with the Authority to develop a plan to share the cost for site development." Joint Supp. Fact Br. App. 55. North Carolina participated in a mediation with the Commission in the hopes of reaching an agreement regarding funding that would allow the licensing process to go forward. Answer to Complaint ¶47.

The mediation and other efforts failed to resolve the funding impasse. North Carolina thus determined to exercise its unconditional right of withdrawal pursuant to Article 7(G) of the Compact. On July 26, 1999, the General Assembly enacted legislation withdrawing North Carolina from membership as a party state and repealing its prior enactment of the Compact. 1999 N.C. Sess. Laws 357.

G. The Commission Holds A Sanctions Hearing.

In August 1999 the Commission voted to initiate the sanctions procedure established by Article 7(F) of the Compact. Answer to Bill of Complaint ¶51. In November 1999 the Commission notified North Carolina that a "formal, quasi-judicial sanctions hearing" would be held on December 8, 1999, and that the Commission would decide on December 9 "whether North Carolina violated the compact law" and determine an appropriate sanction for such violation. Pl. App. 331. North Carolina's Attorney General

responded that the Commission had no jurisdiction over North Carolina subsequent to the State's withdrawal from the Compact and that North Carolina would not participate in the sanctions proceeding. Pl. App. 339-40.

Pursuant to the Compact procedure, a Sanctions Complaint was brought by Compact members Florida and Tennessee and was signed by four voting members of the Commission. Pl. App. 327. Three of the voting members of the Commission - the same members who would be adjudicating the Complaint - testified against North Carolina during the hearing. Def. Supp. App. 68-105. And all Commission members were already on record concerning the issue purportedly to be decided at the "hearing," by virtue of the April 21, 1999, adoption of a Resolution declaring the Commission's belief "that the State of North Carolina currently stands in violation of the compact law." Pl. App. 324. No member of the Commission recused himself or herself from the vote on the Sanctions Complaint, which passed unanimously in a roll call vote on December 9, 1999. Pl. App. 403-04.

The Commission's Sanctions Resolution demanded that North Carolina pay to the Commission:

- $79,930,337 (identified as the amount of funds provided by the Commission for the development of a waste disposal facility), plus interest;

- an additional $10 million for the loss of future disposal surcharges that would have funded the

Commission's operating budget for a period of twenty years; and

- the Commission's attorney's fees.

Pl. App. 410-12. North Carolina declined to make the payment.

H. Motions for Leave to File Bill of Complaint.

On July 10, 2000, the Commission sought leave from this Court to file a Bill of Complaint under this Court's original jurisdiction, seeking summary enforcement of the sanctions order. *See Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n v. North Carolina, No. 131, Orig.* The Court requested the views of the Solicitor General, who argued in response that leave to file should be denied because "[t]he Commission itself is plainly not a State," and "therefore cannot satisfy the fundamental prerequisite for invoking this Court's exclusive jurisdiction." U.S. Br., No. 131, Orig., 8. Further, the Solicitor General agreed with North Carolina that "suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment." U.S. Br., No. 131, Orig., 13. The Solicitor General emphasized that the Commission was not suing in a representative capacity on behalf of the States, but instead in its own right as a legal entity separate and distinct from the party states, asserting its own distinct legal rights:

> The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the

> Commission - and not the States that are parties to the Compact - dispersed the funds to North Carolina in the first place. In accordance with the Compact, the Commission itself generated virtually all of those funds through the assessment of fees on users of the regional waste disposal facility.

U.S. Br., No. 131, Orig., 17. Notably, the Commission agreed with the Solicitor General's premise, specifically contending that "*only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it.*" Supp. Br. in Response to the Br. of the Solicitor General, No. 131, Original, 6 (emphasis added). The States themselves, by contrast, "could sue *only to recoup their out-of-pocket costs*, a small fraction of the total funds that North Carolina received from the Commission, which were generated from fees levied by the Commission on users of the South Carolina waste facility." *Id.* (emphasis added).

This Court denied the motion for leave to file on June 25, 2001. 533 U.S. 926 (2001).

On June 3, 2002 - almost a full year later - the Commission moved again for leave to file a bill of complaint, this time joined by four of the party states as additional plaintiffs. The Court again called for the views of the Solicitor General, who recommended that the motion be granted, because of the presence of States as plaintiffs seeking "relief that would redound to their own benefit." U.S. Br., No. 132, Orig., 11. The

Solicitor General suggested that the Court "focus the litigation on two controlling issues and facilitate the ultimate resolution of the controversy" by inviting cross-motions for partial summary judgment on two questions: (1) whether the Compact empowers the Commission to impose a monetary sanction, and (2) if so, whether the Commission has authority to impose that sanction on a State that has withdrawn as a member of the Compact. *Id.* at 17-18.

This Court granted the motion for leave file on June 16, 2003. 539 U.S. 925 (2003). North Carolina filed its Answer to the Bill of Complaint, along with a Motion to Dismiss the claims of the Commission on Eleventh Amendment and sovereign immunity grounds, on August 15, 2003. On November 17, 2003, this Court appointed Bradford R. Clark as Special Master in the case. 540 U.S. 1040 (2003).

I. Proceedings Before The Special Master.

In March 2004, plaintiffs moved for summary judgment on Count I of the Bill of Complaint, essentially seeking summary enforcement of the Commission's sanctions order. North Carolina moved to dismiss the entire complaint for failure to state a claim. The Solicitor General filed a brief agreeing with North Carolina that Count I should be dismissed, but agreeing with the plaintiffs that the remaining counts should proceed to discovery. The motions were argued orally in September 2004.

1. *The Preliminary Report of the Special Master*.

The Special Master addressed the pending motions in a Preliminary Report issued in June 2006.

The Special Master first recommended denial of North Carolina's motion to dismiss the Commission's claims on Eleventh Amendment and sovereign immunity grounds. A non-State party may participate in an original action, the Special Master concluded, "so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." Prelim. Report 6. At the pleading stage of the proceedings, the Special Master continued, it was not sufficiently clear whether the Commission's claim for restitution of the $80 million it provided to North Carolina was "separate and distinct" from the claims asserted by the States on their own behalf. Prelim. Report 10. The Special Master also recommended denial of North Carolina's motion to dismiss the remaining contract and quasi-contract claims. The pleading stage was, again, too early to determine "whether North Carolina in fact breached its obligations under the Compact." *Id.* at 40. The Special Master also speculated that discovery might show that North Carolina and the Commission "entered into a[] supplemental agreement outside the four corners of the Compact" (Prelim. Report 41), although the complaint included no such allegation.

While thus allowing plaintiffs contract and quasi-contract claims to proceed, the Special Master agreed with North Carolina and the Solicitor General that Count I, seeking summary enforcement of the Sanctions Order, should be dismissed on two distinct grounds: (1) "the Compact does not authorize the

Commission to impose monetary sanctions against member States," and (2) "North Carolina withdrew from the Compact prior to the imposition of sanctions." *Id.* at 15; *see id.* at 42.

2. *The Second Report of the Special Master*.

Following the issuance of the Preliminary Report, the parties conducted substantial written and oral discovery. Pursuant to a stipulated motions schedule and structure, in September 2007 plaintiffs moved for summary judgment on Count II of the complaint (breach of contract), and North Carolina moved for summary judgment on all claims. Following briefing and argument, the Special Master sought supplemental briefing on certain specific questions, and ultimately filed his Second Report in April 2009.

The Second Report recommends that North Carolina be granted summary judgment on Count II because the record facts establish that "North Carolina did not breach its obligation to take 'appropriate steps' under the Compact." Second Report 20; *see id.* at 35. The Special Master rejected plaintiffs' contention that the Compact imposed "an absolute obligation on the host State to build a facility," finding instead that North Carolina's obligation was "more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost." *Id.* at 20-21. The undisputed facts showed that "North Carolina worked consistently to site and license a facility," and that the parties understood from the outset that it would be prohibitively expensive for North Carolina to develop the facility with no outside assistance. *Id.* at

35. Accordingly, "North Carolina's decision to withdraw from the Compact did not constitute a breach of contract" when the Commission terminated all funding assistance. *Id.* at 36. The Special Master also determined that there clearly was no supplemental agreement between North Carolina and the Commission that would have limited the right to withdraw in exchange for financial assistance - indeed, plaintiffs did not even contend that such a distinct agreement existed. Instead, "the Commission provided assistance merely to facilitate North Carolina's performance under the Compact and neither requested nor expected any additional performance." *Id.* at 21.

Finally, having recommended judgment in North Carolina's favor on the summary sanctions enforcement (Count I) and breach of Compact (Count II) claims, the Special Master determined that he would "defer consideration" of North Carolina's motion for summary judgment on the remaining quasi-contract claims (Counts III, IV, and V), because there were, in his view, "legal and factual questions" requiring further briefing and argument and possibly discovery. *Id.* at 45. While recognizing that it "is undisputed that the Commission, rather than the party States themselves," provided North Carolina with financial assistance, and declaring that the quasi-contract, restitution-type claims asserted in Counts III, IV, and V "appear to belong exclusively to the Commission, since it provided the funds at issue," the Special Master hypothesized that it might be "possible that the Plaintiff States may sue *parens patriae* to restore the funds to the Commission." *Id.* at 42.

The Special Master subsequently submitted the Preliminary Report and Second Report, which this Court received and ordered filed on April 27, 2009, subject to the filing of exceptions by the parties.

SUMMARY OF ARGUMENT

I. The Special Master erred in recommending denial of North Carolina's motion to dismiss the claims brought by the Commission. Under both the Eleventh Amendment and common-law sovereign immunity principles, only the United States or a sister State may sue a non-consenting State under this Court's original jurisdiction, absent a valid congressional abrogation of the State's sovereign immunity. Because North Carolina's sovereign immunity from suit by the Commission has not been waived or abrogated, the Commission's claims cannot proceed in this Court.

The Special Master's reports conclude that the Commission's claims may proceed unless and until it is established that the Commission is asserting different claims, seeking differing relief, from the claims asserted by the plaintiff States. To the extent the Commission asserts claims that are not or cannot be asserted by the States, the reports explain, North Carolina is entitled to assert its sovereign immunity from such claims. But at this stage in the proceedings, the Second Report concludes, it remains unclear whether the Commission's claims differ from those of the plaintiff States. The Special Master's analysis errs in two respects.

A. First, in recommending that the Commission's claims be allowed to proceed so long as they are identical to claims being asserted by the plaintiff States, the Special Master's reports rely incorrectly on precedents of this Court allowing Indian tribes and private parties to intervene as parties in actions against States brought by the United States. Those precedents are not clearly or consistently reasoned, but their basic theory is that once this Court's jurisdiction is already properly invoked by a party against whom the State cannot assert sovereign immunity, there is no impermissible enlargement of this Court's jurisdiction if other parties are allowed to piggy-back on the proper claims by asserting identical claims. That theory cannot be reconciled with subsequent decisions of this Court confirming that sovereign immunity is not solely about the limits of this Court's jurisdiction, but is a personal privilege of each State, fundamental to its sovereignty, to decide when, where, and by whom it can be sued (absent a valid congressional abrogation). Because North Carolina has not consented to suit by the Commission in this Court, the Commission's claims cannot proceed.

B. Second, even on the theory of the cases cited by the Special Master, North Carolina is immune from the Commission's claims. Those cases tacitly recognize that the claims of a non-State, non-federal party cannot proceed against a non-consenting State when they are distinct from claims that are otherwise properly asserted against the State. Such claims go beyond what the cases deem to be the permissible jurisdiction of the federal court over the non-consenting State. Although the Special Master's

reports correctly recognize the limiting principle of the cases, the Second Report errs in concluding that it cannot yet be determined whether the Commission's claims for recovery of the $80 million in financial assistance it provided to North Carolina are the same as the claims asserted by the States. In fact, on the undisputed summary judgment record, it is clear as a matter of law and fact that *only* the Commission has any legal claims, in theory, to restitution of the $80 million.

It is black-letter law that restitution may be sought only by the party who provided the benefit, and here it is undisputed that the Commission used its own funds when it provided financial assistance to North Carolina. The Compact makes clear that the Commission is its own legal entity distinct from the States and that its actions are controlled by a majority vote of individual Commissioners. The funds provided to North Carolina were raised by the Commission through the imposition of fees and surcharges directly on private generators. The plaintiff States did not contribute a single cent of the funds provided to North Carolina, and the States have no basis in law or fact for asserting their own ownership interest in, or restitutionary claim to, the Commission's funds.

Because the Commission's claims for restitution belong solely to the Commission and cannot be asserted by the States, North Carolina is immune from the Commission's claims in this Court. The only claims over which this Court has jurisdiction are the contract and quasi-contract claims asserted by the

plaintiff States, seeking remedies for their own distinct injuries.

II. The Special Master also erred in declining to recommend granting North Carolina's motion for summary judgment on the quasi-contract claims asserted in Counts III, IV and V. Those claims are barred as a matter of law by the settled common-law rule that where the parties' relationship concerning a given subject matter is governed by the terms of an express contract, no equitable claim will lie in addition to a claim for breach of contract. Here, the Compact fully and exclusively governs the obligations North Carolina has to the party States with respect to the siting, licensing, and development of a low-level radioactive waste disposal facility within the State of North Carolina. Either the express contractual obligations established by that Compact were breached, or they were not. But either way, no additional equitable obligation can be implied at law beyond the specific obligations explicitly accepted by the sovereign States that agreed to the Compact, and consented to by the Congress that enacted the Compact as federal law.

ARGUMENT

I. THE COMMISSION'S CLAIMS ARE BARRED BY NORTH CAROLINA'S SOVEREIGN IMMUNITY.

The State of North Carolina moved to dismiss the claims of the Commission for lack of jurisdiction and for failure to state a claim upon which relief can be

granted on the grounds that the Commission's claims are barred by the Eleventh Amendment and by the constitutional and common-law principles of sovereign immunity embodied in that Amendment. The Special Master recommended denial of North Carolina's motion, concluding that a non-State party may overcome a State's sovereign immunity from suit in federal court so long as the State is already being sued by another plaintiff against whom the State cannot assert sovereign immunity, and so long as "the non-State party asserts the same claims and seeks the same relief" as the proper plaintiff. Prelim. Report 6.

This Court should reject the Special Master's recommendation and dismiss the Commission's claims for two reasons. First, recent decisions of this Court confirm that a State is conclusively entitled to assert sovereign immunity against claims by non-State entities even if other plaintiffs are permissibly suing the State. Second, the Commission's claims in any event are not identical to those asserted by the State plaintiffs, and thus they are barred by the very principle cited by the Special Master.

A. North Carolina Is Immune From The Commission's Claims Without Regard To Other Plaintiffs' Claims.

1. *North Carolina's Sovereign Immunity Applies To All Claims Except Those By The United States Or A Sister State, And The Commission Is Neither.*

The Eleventh Amendment applies to original actions in this Court, barring suit against an unconsenting State unless the suit is brought by a plaintiff against whom the State cannot assert sovereign immunity. *See Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). Although the Eleventh Amendment by its terms bars only suits against States by citizens of other States, it is now settled that "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 736 (1999). In addition to diversity suits, States are constitutionally immune from suits by foreign nations, *see Monaco, supra*, by federal corporations, *see Smith v. Reeves*, 178 U.S. 436 (1900), and by Indian tribes, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).[4]

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[4] Even if one regards the immunity recognized in these decisions as only a common-law immunity from suit by any non-federal, non-State entity, subject to abrogation by Congress, *see, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 130-42 (1996) (Souter, J., dissenting); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 700 (1999) (Breyer, J., dissenting), that immunity

This Court's precedents have recognized only two types of suits against which a State may not invoke constitutional immunity: a suit by the United States, *see United States v. Texas*, 143 U.S. 621 (1892), and a suit by a sister State, *see South Dakota v. North Carolina*, 192 U.S. 286 (1904). Even as to those types of suits, the general understanding is that the States actually have consented to suit, albeit not in the individual case, but more broadly in the plan of the Convention that underlies our constitutional structure. *See Alden*, 527 U.S. at 755 ("The States have consented ... to some suits pursuant to the plan of the Convention or to subsequent constitutional amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *see also Monaco*, 292 U.S. at 328.

North Carolina is immune from the Commission's claims because the Commission is neither the United States nor a sister State. That conclusion is implicit in this Court's decision to deny the Commission leave to file the complaint in No. 131, Original. In addition, this Court has twice held that a Compact Clause entity is not a State "for Eleventh Amendment purposes" when the entity sought to cloak itself in the immunity of its member States. *Hess v. Port Auth. Trans Hudson Corp.*, 513 U.S. 30, 42 (1994); *see also Lake*

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would extend to suit by the Commission, because the Commission is a non-federal, non-State entity, and North Carolina's immunity from suit has not been abrogated by Congress, *see infra* note 6.

Country Estates, Inc. v. Tahoe Reg. Planning Agency, 440 U.S. 391, 401-02 (1979).

The Southeast Compact confirms the general rule that Compact Clause entities are not considered States. The Compact defines the Commission as "a legal entity separate and distinct from the party states" and explicitly provides that the Commission's liabilities "shall not be deemed to be liabilities of the party states." Compact, Article 4(M)1.

2. *North Carolina Has Not Consented To Suit By The Commission.*

Because the Commission is not a sister State entitled to sue in this Court under the plan of the Convention, the Commission can proceed with its own claims here only if North Carolina waived its immunity from suit by the Commission. It has not.

"The test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one." *State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). The waiver must be "unequivocal," *id.*, evidenced either by "the most express language," *id.* at 240 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)), or by litigation conduct-such as removal by the State itself to federal court-that expresses the State's acceptance of federal jurisdiction with equal "clarity," *see Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002); *see generally College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 678 (1999). Neither form of waiver exists here. There certainly has been no express waiver, and

at every stage of the litigation North Carolina has consistently and vigorously opposed the assertion of jurisdiction by this Court over the Commission's claims.[5]

Nor can the Commission derive any tacit waiver of immunity-much less a clear and unequivocal waiver-from the terms of the Compact itself. Far from expressing the required "unequivocal waiver specifically applicable to federal-court jurisdiction," 473 U.S. at 241, the Compact says not one word about any member State's acquiescence to any suit by the Commission in any court, federal or otherwise. Absent a clear and unequivocal waiver of its immunity, North Carolina remains immune from suit in this Court by the Commission.[6]

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[5] The fact that North Carolina might consent to suit in its own courts is irrelevant: "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation." *College Sav. Bank*, 527 U.S. at 676.

[6] Even if North Carolina's immunity from suit were only a common-law immunity subject to abrogation by Congress, *see supra* note 4, there has been no abrogation of immunity here. Like a waiver, "an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987). The Compact contains no abrogation language of any kind, much less unmistakably clear abrogation language. The Compact says only that the Commission can appear in "any court of law," Compact, Article 4(E)10., which of course says nothing about whether any State may be subjected to suit in federal

3. *The Presence Of State Plaintiffs Does Not Strip North Carolina Of Its Sovereign Immunity Against Claims By The Commission.*

Contrary to the Special Master's recommendation, the presence of plaintiff States with jurisdictionally proper claims does not strip North Carolina of its immunity from the claims of the Commission. "A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("*Pennhurst II*").

In *Pennhurst II*, private party plaintiffs were seeking to establish federal jurisdiction over claims against an unconsenting State for violations of state law. The United States was also a plaintiff in the action. The private plaintiffs argued that their claims should be able to proceed despite the Eleventh Amendment because the State was not immune from the claims of the United States. The Court rejected the argument:

> We ... do not agree with respondents that the presence of the United States as a plaintiff in

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court. *See Welch, supra* (statement that "any seaman" can sue in federal court does not abrogate States' immunity from federal suit by seamen); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 283 (1973) (statement that suit could be brought in "any court of competent jurisdiction" does not abrogate States' immunity from suit).

> this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes.

Id. at 103 n.12 (citations omitted). Likewise, here, the presence of the plaintiff States for the permissible purpose of asserting their own rights under the Compact does not require that North Carolina be subjected against its will to claims by a non-sovereign, non-State entity for $80 million (as well as interest and attorney fees) from the state treasury.

Under this Court's Eleventh Amendment jurisprudence, it makes no difference whether a federal court has "jurisdiction" of any kind over a given claim against a State. All that matters is whether the State decides to invoke its immunity against that claim. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) ("whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction"). If the State does not invoke that immunity, then the federal court may exercise its jurisdiction and the claim may proceed to judgment. *See Wisconsin Dep't of Corrections v. Schact*, 524 U.S. 381, 389 (1988) ("the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so"). But if the State does invoke its immunity against a claim, then the court loses its power to adjudicate that

claim. *See id.* at 392-93 ("A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims ... before us."). In other words, the mere existence of federal jurisdiction - be it original or removal or the more ephemeral "ancillary" jurisdiction - is not enough to force a sovereign State to submit to the claims of an unwanted suitor. *See Oneida County*, 470 U.S. at 251. In *Oneida County*, a party whose claims against a State were otherwise barred by the Eleventh Amendment argued that the claims could be heard because they fit within the normal "ancillary jurisdiction" of the federal court. This Court agreed that the claims "raise[] a classic example of ancillary jurisdiction," 470 U.S. 251, but held, relying on *Pennhurst II*, that such jurisdiction did not suffice to overcome the State's sovereign immunity:

> The Eleventh Amendment forecloses ... the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State .... [N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. The indemnification claim here, whether cast as a question of New York law or federal common law, is a claim against the State for retroactive monetary relief. In the absence of the State's consent,

> the suit is barred by the Eleventh Amendment. Thus, as the Court of Appeals recognized, whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction over the counties' claim for indemnification.

Oneida County, 470 U.S. at 251 (quotations and citations omitted).

It is true that some earlier cases allowed non-State, non-federal parties to intervene as plaintiffs in original actions against non-consenting States when the United States was already a plaintiff in the action, and when the non-governmental party was asserting the same claims as the United States. *See Arizona v. California*, 460 U.S. 605, 614 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). Those decisions were apparently premised on a kind of "harmless jurisdictional error" theory: once the State was already subject to claims validly asserted pursuant to the Court's original jurisdiction, there was no material additional burden on the State to subject it to jurisdiction over the same claims asserted by another party. As the *Arizona* Court reasoned:

> The Tribes do not seek to bring new claims or issues against the States, but only ask for leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore our judicial power over the controversy is not enlarged by granting leave to intervene, and the States'

> sovereign immunity protected by the Eleventh Amendment is not compromised.

460 U.S. at 614. The *Maryland* Court offered little by way of explanation for overriding Eleventh Amendment immunity other than a cite to *Oklahoma v. Texas*, 258 U.S. 574, 582 (1922), in which Eleventh Amendment immunity does not appear to have been asserted,[7] and a "cf." cite to a private civil case involving intervention where it would cause the defendant "relatively little additional burden," *Trbovich v. Mine Workers*, 404 U.S. 528, 536 (1972).

The theory suggested in those cases reflects an improperly narrow conception of the Eleventh Amendment as governing only the exercise of this Court's subject matter jurisdiction. Once that jurisdiction is properly invoked, the reasoning suggests, the sovereign immunity underlying the

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[7] *Oklahoma* does not discuss Eleventh Amendment immunity, but in explaining why private parties in the case should be allowed to intervene in the original action, it posits a theory of "ancillary" jurisdiction that is essentially the mirror opposite of the "no enlargement" theory offered in *Arizona*: whereas the *Arizona* Court assumed that the addition of otherwise-barred claims would not enlarge this Court's jurisdiction once the United States has already properly invoked it, the *Oklahoma* Court assumed that allowing private claims to proceed would enlarge the Court's jurisdiction, but that such enlargement was permissible because the new jurisdiction was "ancillary" to its original jurisdiction over the claims of the United States and of sister States. *See* 258 U.S. at 581-82.

Amendment ceases to operate. That view simply cannot be reconciled with the long line of cases recognizing that the Eleventh Amendment is *not* solely about the exercise of the federal judicial power, but embodies a more fundamental sovereign immunity from suit in *all* courts against all claims by *all* non-federal, non-State parties, unless there is a valid waiver or abrogation of immunity.

As early as *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall explained that the Eleventh Amendment is premised not so much on the indignity of subjecting a State to suit in federal court, but on the indignity of being subjected to suit by monetary creditors who - like the Commission here - are not sister States, *id.* at 406-07.

More recently, the Court's holding in *Alden*, that the Eleventh Amendment's core protection of sovereign immunity extends to suit in state court, establishes that sovereign immunity implicates more than just the exercise of federal judicial power. The "States' immunity from suit is a fundamental aspect of the[ir] sovereignty," *Alden* explains, and it "neither derives from nor is limited by the terms of the Eleventh Amendment." 527 U.S. at 713.

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over non-consenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, there is also the postulate that States of the Union, still possessing attributes of

> sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention. This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.

527 U.S. at 730 (quotations, citations, and alterations omitted). The Eleventh Amendment, in other words, is not only a limitation on this Court's jurisdiction (though it is at least that), but also an expression of the State's sovereign right to decide when and where and by whom it may be sued.

It is not just *Alden* that recognizes this fundamental point. Indeed, one does not even have to accept *Alden*'s basic holding that Congress may not abrogate a state's immunity from suit in her own courts, *see, e.g.*, *Alden*, 527 U.S. at 760 (Souter, J., dissenting), to accept that a State is immune from suit in any court absent her consent at least as a matter of common law, unless Congress validly abrogates her immunity, *see id.* at 798; *College Sav. Bank*, 527 U.S. at 700 (Breyer, J., dissenting) ("Sovereign immunity is a common-law doctrine .... permitting Congress to narrow or abolish state sovereignty where necessary."); *supra* note 4. Thus, although the scope of Eleventh Amendment immunity has been vigorously disputed in this Court's opinions, the Court has been unanimously of the view that, at least barring a valid abrogation, the Amendment "grants the State a legal power to assert a sovereign immunity defense should it choose

to do so." *Schacht*, 524 U.S. at 389; *see Hess*, 513 U.S. at 39 ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals."); *see also Briscoe v. President & Dirs. of Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837) ("No sovereign state is liable to be sued without her consent."). Because there has been no abrogation here, *see supra* note 4, the limits of North Carolina's immunity from suit by non-federal, non-State entities are defined only by her own consent - not by the assertion of this Court's jurisdiction.

The Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank*, 527 U.S. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). Thus a State may waive its immunity from suit in state court but not federal, *see id.* at 676, and a State may waive its immunity from suit by persons bringing state law claims but not analogous federal claims, *see Alden*, 527 U.S. at 758. To the extent that a State chooses "to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." *Id.* The States' consent in the plan of the convention to one class of claims thus does not waive the States' immunity from others, such that barred claims may ride piggy back on permitted claims. To so hold would nullify the State's constitutional (or common law) privilege to decide when it will consent to be sued.

Beyond the two kinds of suits specifically contemplated in the founding era, this Court made clear in *College Savings Bank* that there are only "two circumstances" in which a State may be subjected to suit in federal court: when Congress validly abrogates the State's immunity, and when the State waives its immunity. 527 U.S. at 670. There has been no abrogation by Congress and no waiver by North Carolina here. *College Savings Bank* says nothing about a "third circumstance," *i.e.*, when the State is already being sued by the United States or by other States. It follows that even if the plaintiff States are entitled to proceed against North Carolina on their own claims, North Carolina remains immune from suit by the Commission.

B. North Carolina Is Immune From The Commission's Claims Because They Are Distinct From The Claims Asserted By The States.

The Special Master's recommendation to deny North Carolina's motion to dismiss the Commission's claims rested on his reading of precedents, discussed above, "suggest[ing] that a non-State party may join a State ... in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." Prelim. Report 5-6.

As demonstrated above, those precedents cannot be reconciled with decisions of this Court holding that sovereign immunity is each State's "personal privilege" to assert, and is not dependent on the existence of

other claims to which the States originally consented in the plan of the convention. But even if the decisions cited by the Special Master survived the sovereign immunity analysis in subsequent cases such as *Alden*, those decisions still would not save the Commission's claims here, because, as the Special Master recognized, they do not apply to the extent that "the Commission asserts claims that the States themselves cannot assert." *Id.* at 6. And as the Special Master further recognized, the quasi-contract claims for restitution of the $80 million provided to North Carolina by the Commission "appear to *belong exclusively to the Commission*, since it provided the funds at issue." Second Report 42 (emphasis added). Although the Special Master's reports have thus far declined to resolve that issue conclusively, there is no basis for further delay. Discovery on the issue is now complete, and it is clear from the undisputed record that, as a matter of law and fact, only the Commission can pursue restitution of the $80 million - the States have no legal or factual claim to those funds. Because North Carolina has not consented to the Commission's claims for restitution of the funds, this Court cannot assert jurisdiction over those claims.

1. *The Plaintiff States May Not Seek Restitution Of Funds Provided To North Carolina By The Commission.*

It is axiomatic that restitution is only available to a party that itself conferred a benefit on another party. "A party's restitution interest is his interest in having restored to him any benefit that he has conferred on the other party. Restitution is, therefore, available to a party only to the extent that he has conferred a benefit on the other party .... The benefit *must have been conferred by the party claiming restitution.*" *Restatement (Second) of Contracts* § 370 cmt. a (1981) (emphasis added) (citation omitted); accord *Restatement of Restitution* § 1 cmt. a (1937) ("A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.").

Federal courts have routinely applied the principle requiring that a plaintiff seeking the remedy of restitution to show that the plaintiff (rather than a third party) actually conferred the benefit on the defendant. *See In re Rezulin Products Liability Litig.*, 392 F. Supp. 2d 597, 619 (S.D.N.Y. 2005) ("The benefit at issue must have been conferred on the defendant by the plaintiff, not by some third party."); *Eli Lilly and Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 496 (D.N.J. 1998) ("[I]t is the plaintiff's (as opposed to a third party's) conferral of a benefit on defendant which forms the basis of an unjust enrichment claim."). The decision in *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997) is

instructive. In that case, twelve local governments sued various cigarette manufacturers alleging a conspiracy to misrepresent the adverse health effects of smoking. The local governments brought a claim for restitution, which asserted that because of the misrepresentations, the defendants had earned significant profits from the sale of cigarettes to indigent persons who, in turn, had suffered major health problems, resulting in increased public health care costs to the plaintiffs. The plaintiffs contended that the defendants' failure to pay for these health-related costs had unjustly enriched them. *Id.* at 1144. The court rejected the claim:

> While courts have broad equitable powers to redress wrongs, plaintiffs are asking this Court to stretch its powers too far here. If defendants have indeed been unjustly enriched, in that their profits were increased as a result of wrongful conduct, *the enrichment was at the expense of individual smokers, not of the city and counties.* Plaintiffs cite no benefit which has been conferred on defendants by plaintiffs themselves.

Id. (citation omitted) (emphasis added).

The black-letter rule that a plaintiff may seek restitution only of moneys paid by the plaintiff itself (directly or through a proper legal agent) precludes the States here from seeking restitution of the moneys paid by the Commission to North Carolina. As shown in the next section, the Plaintiff States neither possessed any ownership interest in the Commission's

money nor sent any funds of their own to North Carolina. No monetary benefit whatsoever was provided to North Carolina by the Plaintiff States. For this reason, while the Plaintiff States can (in theory) pursue a breach of contract claim against North Carolina and seek the recovery of their own expectation damages or out-of-pocket losses, the Plaintiff States cannot assert any claim seeking the recovery of money provided to North Carolina by the Commission. It is only the Commission - and not the Plaintiff States - that can assert any claim for restitution of moneys paid by the Commission to North Carolina.

2. *The Southeast Compact's Structure And Operating History Show That All Funding Assistance Came Exclusively From The Commission*.

The Compact clearly and unmistakably establishes the Commission as a separate legal entity from the member States:

> The Commission herein established is a legal entity separate and distinct from the party states capable of acting on its own behalf and is liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states.

Compact, Article 4(M)(1). The Commission also has the independent authority to impose and collect special fees and surcharges on users of any regional waste

facility to fund activities in furtherance of its defined duties. Compact, Article 4(H)(2).

The Commission exercised that authority to produce the funds provided to North Carolina. As noted by the Special Master, "[t]he Commission's funds did not come from the party States. Rather, they were raised through surcharges and fees imposed on waste generators who used the Barnwell facility in South Carolina." Second Report 15. The funds thus were "Commission Funds," not State funds. *Id.* at 16. To raise the funds, the Commission imposed a variety of revenue-producing mechanisms on waste disposed at the Barnwell facility, including a per cubic foot surcharge, a capacity assurance charge under Article 4(H), access fees on generators located within the region established under Article 3(B), as well as separate access fees for out-of-region generators. Def. App. 152a-56a. Of the $79.9 million in financial assistance provided by the Commission, $56.3 million came from fees and surcharges paid by generators located within the Compact region, while $23.6 million was paid by out-of-region generators. Def. App. 98a. Additionally, over $35 million of the $56.3 million paid by in-region generators resulted from access fees assessed under Article 3(B) of the Compact as distinguished from capacity charges imposed and collected pursuant to Article 4. Def. App. 152a-56a.

The Special Master's conclusion from the record is unassailable: "It is undisputed that the Commission, rather than the party States themselves, provided North Carolina with approximately $80 million in financial assistance." Second Report 42.

3. *The States Themselves Have No Cognizable Legal Interest In The Commission's Own Funds.*

A State cannot invoke original jurisdiction for the benefit of non-State entities, even if the State asserts some indirect economic interest in the claim. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938). "T]he State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Id.* at 396. Where it is apparent that the name of the state is being used simply for the prosecution of a claim of another entity, the original jurisdiction of this Court cannot be maintained. *Kansas v. United States*, 204 U.S. 331, 341 (1907).

Although the Plaintiff States here "concede that the Commission rather than the States themselves provided the funds in question," (Second Report 46), the States nevertheless assert a direct legal interest in the Commission's funds, which they say entitles them to pursue restitution of the funds in their own behalf. The States articulated two theories of direct interest before the Special Master:

> First, they argue that the funds raised by the Commission through fees and surcharges should be considered contributions by the States within the meaning of the Compact. Second, they argue that the Commission was acting as the States' agent when it provided the funds in question to North Carolina.

Id. at 46-47. Neither theory has any legal or factual basis.

a. *The Compact Does Not Give The States Any Ownership Interest In The Fees And Surcharges Collected By The Commission.*

Plaintiffs first contend that the funds transmitted to North Carolina actually belonged to the Compact's member States. This argument relies upon Article 4(H)2.b. of the Compact, which provides that certain fees and surcharges levied on private generators under that provision "represent the financial commitments of all party states to the Commission." It is clear from its context, however, that this provision does nothing to convert the revenues of the Commission into property of the States.[8]

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[8] The undisputed facts show that only a small percentage of the funds collected by the Commission from waste generators using the Barnwell facility constituted Article 4(H)2.b. capacity charges paid by in-region generators. The vast majority of the total funds provided to North Carolina either were collected from generators from outside the Southeast Compact region, or were access fees imposed on in-region generators pursuant to Article 3(B) of the Compact. Def. App. 152a-56a. And nothing in the Compact provides that revenues raised pursuant to Article 3(B) represent the "financial commitments" of the party States. The evidence shows that some $35 million provided to North Carolina came from fees and surcharges imposed pursuant to Article 3(B) and another $23.4 million came from out-of-region access fees. Only the capacity charges paid by generators located within the Compact region could

Article 4 of the Compact is entitled "The Commission," and all of the provisions thereunder concern the Commission. Article 4(H), in its entirety, addresses funding for the Commission. Compact, Article 4H ("Funding for the Commission must be provided as follows:"). And with one trivial exception, none of its provisions contemplate revenues to or from the States. The exception is sub-paragraph 1., which compels each State to make an initial payment of $25,000 "to the Commission which shall be used for the costs of the Commission's services." Beyond that initial payment, the Commission's annual revenues are to be derived entirely from "special fees or surcharges on all users of the facility" based on waste volume, the total of which:

a. must be sufficient to cover the annual budget of the Commission; and
b. must represent the financial commitments of all party states to the Commission; and
c. must be paid to the Commission.

Compact, Article 4(H)2. These sub-parts must be read together and in light of the provision's singular express purpose of providing funding for the Commission. *See Dolan v. USPS*, 546 U.S. 481, 486 (2006); *FTC v. Mandel*, 359 U.S. 385, 389 (1959).

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even possibly "represent the financial commitments" of the member States under Article 4, and that amount did not exceed $21 million.

Read in that proper context, it is clear that the "financial commitments" language was not intended to transform the fees and surcharges collected directly by the Commission from private generators into legally recognized assets of the member States. Had there been an intent for the funds to belong to the States, Article 4(H)2. would not have used the word "commitments," but instead would have used the word "assets," "property," or some other similar term connoting a possessory interest in the States. The phrase "financial commitments" instead establishes and limits each State's financial liability to the Commission: whatever may be the Commission's annual budgetary needs, each State's individual financial obligation to the Commission under the Compact will never exceed the initial $25,000 payment. By operation of Article 4(H)2., all other liabilities for the Commission's annual budget are deemed legally satisfied by the fees and surcharges imposed on private generators. The collection of fees and surcharges from generators thus ensured that no further taxpayer money would be taken from the member States' treasuries to be used in funding the Commission's budget.

The proper meaning of sub-paragraph b. is further evidenced by its positioning between sub-paragraph a. (which requires that the surcharges be sufficiently large so as to cover the Commission's annual budget) and sub-paragraph c. (which requires that the surcharges, once collected, be paid to the Commission). Compact, Article 4(H)2. The common feature of all three sub-paragraphs is to establish assets for use by

the Commission-not to create assets owned by the member States.

Even if the funds could in theory be described as the States' assets for some indeterminate moment in time as they passed from private generators to the Commission, they certainly ceased being the States' assets when the Commission assumed exclusive domain over them. As discussed above, the Compact unambiguously established the Commission as a separate legal entity. Compact, Article 4(M)1. The Commission in turn functions autonomously - maintaining its own bank account, hiring employees, renting office space, and otherwise operating as a fully viable legal entity. Thus, any ownership interest the member States would have possessed even in theory under Plaintiffs' interpretation of Section (H)2.b. would have ended upon the payment of the funds to the Commission: at that point the Commission would have been the legal owner of the funds and its ownership would have continued through such time as the funds were disbursed to North Carolina.

Because the surcharge funds never belonged to the Plaintiff States-and certainly did not belong to them at the time financial assistance was provided to North Carolina-the Plaintiff States cannot assert claims sounding in restitution to recover those funds.

b. *The Commission Did Not Act As An Agent For The Party States When Disbursing Commission Funds To North Carolina.*

Plaintiff States also argue that the Commission acted as the "agent" of the Plaintiff States such that its provision of funds to North Carolina was legally undertaken on their behalf. This argument is equally meritless.

"Agency" is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982) (quoting *Restatement (Second) of Agency* § 1 (1958)). The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. *Restatement (Second) of Agency* §1, cmt. a.

Plaintiffs' attempt to invoke agency principles in this case lacks both a factual and a legal foundation. At the various times the surcharge funds were transmitted by the Commission to North Carolina, no agreement existed between the Commission and the Plaintiff States purporting to establish the Commission as the agent of each member State. The only agreement executed at all by the member States relating to the Compact was the Compact itself. Nothing therein purported to create an agency relationship so as to make the Commission the agent of each member State regarding the ownership of the

surcharge funds. To the contrary, clear and unambiguous language in the Compact: (1) established the Commission as "a legal entity separate and distinct from the party states capable of acting in its own behalf and ... liable for its actions"; and (2) made clear that "[l]iabilities of the Commission shall not be deemed liabilities of the party states." Compact, Article 4(M)1. If the Commission were the States' agent, then the States would be liable to others for its actions. Yet the Compact explicitly provides exactly the opposite. Plaintiffs have yet to point to any authority recognizing a legal agency relationship under such circumstances.

Plaintiffs' agency argument is also inconsistent with the provision of the Compact that authorizes sanctions (in the form of suspension or expulsion from the Compact) to be imposed by the Commission on member States who fail to comply with the provisions of the Compact. See Compact, Article 7(F). Obviously, the notion of an agent possessing punitive powers over its principal is completely inconsistent with basic tenets of a principal/agent relationship.

Plaintiffs' agency theory is equally inconsistent with provisions in Article 4 of the Compact mandating that surcharges "be paid to the Commission" and that they be used "to cover the annual budget of the Commission." Compact, Article 4(H)2.a. and c. This language refutes any suggestion that surcharge revenue was simply to be held by the Commission subject to the demands of each member State in its respective capacity as the Commission's principal. By virtue of these provisions of the Compact, the

individual member States had no control or dominion *at all* over the surcharge funds-much less the type of absolute control that is at the core of a principal/agent relationship. Rather, sub-paragraphs a. and c. of Article 4(H)2. firmly established that the surcharges were to be paid directly to, and used solely by, the Commission itself.

Plaintiffs' agency argument also ignores the undisputed fact that resolutions authorizing the transmittal of the funds were passed by the Commission before any of the surcharge funds were sent to North Carolina. Nothing in these resolutions stated or suggested in any way that the Commission was providing these funds to North Carolina in an agency capacity on behalf of the individual member States. *See* Def. App. 72a, 86a, 87a.

The Compact also makes clear that *the appointed Commissioners*, not the party States themselves, control the Commission by majority vote of *the individual Commissioners* (*i.e.*, rather than votes by States). *See* Compact, Article 4(B) (Commission action not binding unless agreed upon by majority of Commissioners), Compact Article 4(E)9. (recognizing that Commissioners from the same State may cast conflicting votes). No member State can instruct the Commission to do anything-contrary to a genuine agency relationship.[9]

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[9] Even if both members of the Commission from a party state request the Commission to act or appear on behalf of such state, "[t]he authority to act, intervene, or otherwise appear shall be exercised by the Commission only after

This Court's own precedent confirms that Compact Clause entities do not operate subject to the individual control of member States that would be characteristic of an agency relationship:

> Because Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any "one of the United States," their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single State has.... [B]istate entities created by compact ... are not subject to the unilateral control of any one of the States that compose the federal system.

Hess v. Port Auth. Trans Hudson Corp., 513 U.S. 30, 42 (1994) (citations omitted); *see also* Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 Yale L. & Pol'y Rev. 163, 167, 184 (2005) ("While it might seem that the agencies are subject to the interests of the sovereigns that created them, each creating sovereign no longer has exclusive control over the area of the agency's jurisdiction; [C]ompacts create entities that are no longer beholden to their creators.").

Contrary to the argument advanced by plaintiffs below, the basic corporate structure of the Commission does not authorize suit by individual member States to recover funds expended by the Commission on an

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approval by a majority vote of the Commission." Compact Article 4(E)10.

agency theory. To the contrary, the Commission's corporate structure precludes such suits. As noted above, the Compact expressly provides that the Commission is a legal entity separate and distinct from the party States and that its liabilities shall not be imputed to the party States. Compact, Article 4(M)1. The reference to "a 'separate legal person'" indicates "that Congress had corporate formalities in mind." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). And "where parties choose the corporate form and receive all the benefits that flow from that structure, we should be hesitant to ignore the consequences." *Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234,1241 (10th Cir. 2006).

The relevant consequence here is that a member of an association, like the stockholder of a corporation, generally may not bring a distinct, individual suit seeking restoration of funds belonging to the association (or corporation) itself. *See Indus. Elecs. Corp. of Wisconsin v. iPower Distrib. Group, Inc.*, 215 F.3d 677, 680 (7th Cir. 2000) ("The association agreement created a new legal entity, much as a corporate charter does, whose investors were the eight dealers. Those eight dealers stood as shareholders in a corporation and could not sue a third party individually or on behalf of the corporation."). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities," *Dole*, 538 U.S. at 474, and thus "a stockholder of a corporation has no personal or individual right of action against third persons for damages that result indirectly to the stockholder because of an injury to the corporation."

Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185, 1194 (7th Cir. 1985).[10]

In short, like any other corporate shareholder or association member, the plaintiff States have no legal basis for pursuing their own individual claims for recovery of money allegedly owed to the association entity. The quasi-contract claims for restitution of the funds provided to North Carolina by the Commission belong solely to the Commission. The Commission's claims for such restitution thus are not, and legally cannot be, the same claims asserted by the States, which can seek (in theory) at most only recovery of their own out-of-pocket expenses.[11] Because the

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[10] An individual shareholder or member may assert the corporate entity's claims in a "derivative" capacity only when the entity itself declines suit, and only when the entity itself could otherwise sue. *See Daily Income Fund v. Fox*, 464 U.S. 523, 529 (1984) ("the term 'derivative action' ... has long been understood to apply only to those actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court"); *Hawes v. Oakland*, 104 U.S. 450, 460 (1882) (derivate suit must be "founded on a right of action existing in the corporation itself" and thus "the corporation itself [must be] the appropriate plaintiff"). Here, because North Carolina is immune from claims by the Commission *qua* Commission, the party States cannot asserts the Commission's claims on its behalf.

[11] This conclusion holds regardless whether the Court adopts the Special Master's recommendation to grant summary judgment to North Carolina on the substantive

Commission's claims are not the same as the States', North Carolina is entitled to assert its sovereign immunity against the Commission's claims. Those claims should be dismissed.

II. NORTH CAROLINA IS ENTITLED TO SUMMARY JUDGMENT ON THE STATES' QUASI-CONTRACT CLAIMS IN COUNTS III, IV, AND V.

While North Carolina excepts from the Special Master's recommendation to deny the motion to dismiss all claims of the Commission for lack of jurisdiction, North Carolina of course agrees with the recommendations to dismiss Count I (summary enforcement of Commission sanctions order) on its merits, and to grant summary judgment to North

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merits of the plaintiff's breach of contract claim (Count II). Even if the States were allowed to pursue their own remedies for breach of the Compact, they have no legal basis for pursuing restitution to the Commission as a contract remedy. Not only did the funds belong exclusively to the Commission, but plaintiffs also cannot point to any provision *in the Compact* conditioning North Carolina's receipt of funds from the Commission on the construction of a facility prior to withdrawal. The Commission itself is not a party to the Compact, and even if North Carolina's exercise of its unambiguous withdrawal rights somehow constituted a breach of its obligations to the other party States, North Carolina was never under any Compact-based obligation *to the Commission* to construct a facility or return the funds. Again, the Commission's legal interest in those funds is distinct from the States'.

Carolina on Count II (breach of the Compact) on its merits. What remains are Counts III-V, equitable claims seeking recovery of the funds provided to North Carolina by the Commission. Count III asserts a claim of unjust enrichment, Count IV asserts a promissory estoppel, and Count V asserts the obscure claim of "money had and received." Despite their distinct labels, the gravamen of each claim is the same: North Carolina received money from the Commission but ultimately provided nothing in return, and should be required to return the money in equity and good conscience.[12]

The plaintiffs' quasi-contract claims cannot survive alongside the claim for breach of the express Compact terms. North Carolina's obligations to its sister States with regard to low-level radioactive waste disposal are governed entirely by the Compact. The whole point of the Compact is to establish the sole legal "instrument and framework" for a joint effort to dispose of such waste. Compact, Article 1 ("Policy and purpose"). And the Compact itself makes clear that the explicit obligations it creates concerning disposal facilities are the sum total of each State's obligations to the others: "The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights." Compact, Article 3 (emphasis added).

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[12] Count V - Money had and received - explicitly seeks to have North Carolina "pay over to *the Commission* $79,930,337." (Comp. ¶ 86) (emphasis supplied)

It is a settled common-law rule that "there can be no claim for unjust enrichment when an express contract exists between the parties." *Albrecht v. Comm. on Employee Benefits of Fed. Reserve Employee Benefits Sys.*, 357 F.3d 62, 69 (D.C. Cir. 2004). That is, where an express contract establishes the terms of the parties' relationship concerning a given subject matter, the contract's terms are exclusive, and a party that has not breached the express contract cannot be subjected to an equitable claim asserting the breach of other, non-contractual obligations involving the same subject matter. "When a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement." *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000); *accord Booe v. Shadrick*, 369 S.E.2d 554 (N.C. 1988); *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600 (Md. 2000); *Interbank Invs. v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo. Ct. App. 2003); *Bloomgarden v. Coyer*, 479 F.2d 201, 210 (D.C. 1973); *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1194 (D.D.C. 1997); *Miller v. Schloss*, 218 N.Y. 400, 218 N.Y. (N.Y.S.) 400, 113 N.E. 337 (1916); *Parsa v. State*, 64 N.Y.2d 143, 474 N.E.2d 235, 485 N.Y.S.2d 27 (1984) (money had and received is a contract implied in law which the law creates in the absence of an agreement). Thus, for example, in *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008), the court held that an excess insurer did not breach its contractual coverage obligation, and the court refused to recognize an equitable right to reimbursement

because to do so would have required the court to effectively modify the policies' language. *Id.* at 50.

The same rule applies here - with greater force, if anything. An interstate compact is a unique creature of federal and state law, through which Congress and multiple sovereign States together work out and impose on the member States very specific obligations they would otherwise be free to forgo as sovereign entities. Unstated duties should not be imposed, simply by operation of equity, on top of those obligations carefully detailed by the sophisticated political and sovereign actors that negotiate, draft, enact, and implement interstate compacts.

The claims set forth in Counts III, IV, and V seek equitable reimbursement of the funds provided by the Commission to assist in North Carolina's efforts to perform its Compact obligations. But the Compact itself is the sole and exclusive source of North Carolina's obligations to the other party States in respect to the siting and licensing of a disposal facility. If North Carolina did not breach the terms of the Compact, then it cannot be liable in equity for breach of other, unwritten obligations concerning the exact same subject. And if North Carolina did breach the Compact, then plaintiffs have a remedy at law for whatever damages they suffered as a result of that breach, and no separate equitable claim for those or other damages will lie. North Carolina's motion for summary judgment on Counts III-V should be granted.

CONCLUSION

The Exceptions of the State of North Carolina to the Preliminary Report and the Second Report of the Special Master should be sustained. North Carolina's motions to dismiss all claims brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission and for summary judgment as to Counts III, IV, and V of the Bill of Complaint should be granted.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

* *Counsel of Record*

June 2009

APPENDIX

Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act
Pub. L. No. 99-240, Title II,
99 Stat. 1871 (1986) as amended by
Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171,
103 Stat. 1289 (1989) 1a

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Pub. L. No. 99-240, Title II, 99 Stat. 1871 (1986)
as amended by 103 Stat. 1289 (1989)

SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT

ARTICLE 1
POLICY AND PURPOSE

There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Compact. The party States recognize and declare that each state is responsible for providing for the availability of capacity either within or outside the state for disposal of low-level radioactive waste generated within its borders, except for waste generated as a result of defense activities of the federal government or federal research and development activities. They also recognize that the management of low-level radioactive waste is handled most efficiently on a regional basis. The party states further recognize that the Congress of the United States, by enacting the Low-Level Radioactive Waste Policy Act (Public Law 96-573), has provided for and encouraged the development of low-level radioactive waste compacts as a tool for disposal of such waste. The party states recognize that the safe and efficient management of low-level radioactive waste generated within the region requires that

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as amended by 103 Stat. 1289 (1989)

sufficient capacity to dispose of such waste be properly provided.

It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort; provide sufficient facilities for the proper management of low-level radioactive waste generated in the region; promote the health and safety of the region; limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region; encourage the reduction of the amounts of low-level waste generated in the region; distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states, and ensure the ecological management of low-level radioactive wastes.

Implicit in the congressional consent to this compact is the expectation by Congress and the party states that the appropriate federal agencies will actively assist the Compact Commission and the individual party states to this compact by:

1. expeditious enforcement of federal rules, regulations and laws;

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2. imposing sanctions against those found to be in violation of federal rules, regulations and laws;

3. timely inspection of their licensees to determine their capability to adhere to such rules, regulations and laws;

4. timely provision of technical assistance to this compact in carrying out their obligations under the Low-Level Radioactive Waste Policy Act, as amended.

ARTICLE 2
DEFINITIONS

As used in this compact, unless the context clearly requires a different construction:

1. "Commission" or "Compact Commission" means the Southeast Interstate Low-Level Radioactive Waste Management Commission.

2. "Facility" means a parcel of land, together with the structure, equipment and improvements thereon or appurtenant thereto, which is used or is being developed for the treatment, storage or disposal of low-level radioactive waste.

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3. "Generator" means any person who produces or possesses low-level radioactive waste in the course of or as an incident to manufacturing, power generation, processing, medical diagnosis and treatment, research, or other industrial or commercial activity. This does not include persons who provide a service to generators by arranging for the collection, transportation, storage or disposal of wastes with respect to such waste generated outside the region.

4. "High-level waste" means irradiated reactor fuel, liquid wastes from reprocessing irradiated reactor fuel, and solids into which such liquid wastes have been converted, and other high-level radioactive waste as defined by the U.S. Nuclear Regulatory Commission.

5. "Host state" means any state in which a regional facility is situated or is being developed.

6. "Low-level radioactive waste" or "waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or by-product material as defined in section 11e, (2) of the Atomic Energy Act of 1954, or as may be further defined by Federal law or regulation.

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7. "Party state" means any state which is a signatory party to this compact.

8. "Person" means any individual, corporation, business enterprise, or other legal entity (either public or private).

9. "Region" means the collective party states.

10. "Regional facility" means (1) a facility as defined in this article which has been designated, authorized, accepted or approved by the Commission to receive waste or (2) the disposal facility in Barnwell County, South Carolina, owned by the State of South Carolina and as licensed for the burial of low-level radioactive waste on July 1, 1982, but in no event shall this disposal facility serve as a regional facility beyond December 31, 1992.

11. "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any other territorial possession of the United States.

12. "Transuranic wastes" means waste material containing transuranic elements with contamination levels as determined by the regulations of (1) the U.S.

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Nuclear Regulatory Commission or (2) any host state, if it is an agreement state under section 274 of the Atomic Energy Act of 1954.

13. "Waste management" means the storage, treatment, or disposal of waste.

ARTICLE 3
RIGHTS AND OBLIGATIONS

The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights.

(A) Subject to any license issued by the U.S. Nuclear Regulatory Commission or a host state, each party state shall have the right to have all wastes generated within the borders stored, treated, or disposed of, as applicable, at regional facilities and, additionally, shall have the right of access to facilities made available to the region through agreements entered into by the Commission pursuant to article 4(E)9. The right of access by a generator within a party state to any regional facility is limited by its adherence to applicable state and federal law and regulation.

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(B) If no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host state or states and approved by a two-thirds vote of the Commission.

(C) Each party state must establish the capability to regulate, license, and ensure the maintenance and extended care of any facility within its borders. Host states are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities in accordance with the provisions of Article 5, section (B).

(D) Each party state must establish the capability to enforce any applicable federal or state laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders.

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(E) Each party state must provide to the Commission on an annual basis any data and information necessary to the implementation of the Commission's responsibilities. Each party state shall establish the capability to obtain any data and information necessary to meet its obligation.

(F) Each party state must, to the extent authorized by federal law, require generators within its borders to use the best available waste management technologies and practices to minimize the volumes of waste requiring disposal.

ARTICLE 4
THE COMMISSION

(A) There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Commission, ("Commission" or "Compact Commission"). The Commission shall consist of two voting members from each party state to be appointed according to the laws of each state. The appointing authorities of each state must notify the Commission in writing of the identity of its members and any alternates. An alternate may act on behalf of the member only in the member's absence.

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(B) Each commission member is entitled to one vote. No action of the Commission shall be binding unless a majority of the total membership cast their vote in the affirmative, or unless a greater than majority vote is specifically required by any other provision of this compact.

(C) The Commission must elect from among its members a presiding officer. The Commission shall adopt and publish, in convenient form, by-laws which are consistent with this compact.

(D) The Commission must meet at least once a year and also meet upon the call of the presiding officer, by petition of a majority of the party states, or upon the call of a host state. All meetings of the Commission must be open to the public.

(E) The Commission has the following duties and powers:

1. To receive and approve the application of a nonparty state to become an eligible state in accordance with the provisions of Article 7(B).

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2. To receive and approve the application of a nonparty state to become an eligible state in accordance with the provisions of Article 7(C).

3. To submit an annual report and other communications to the Governors and to the presiding officer of each body of the legislature of the party states regarding the activities of the Commission.

4. To develop and use procedures for determining, consistent with considerations for public health and safety, the type and number of regional facilities which are presently necessary and which are projected to be necessary to manage waste generated within the region.

5. To provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities.

6. To develop and adopt, within one year after the Commission is constituted as provided for in Article 7(D) procedures and criteria for identifying a party state as a host state for a regional facility as determined pursuant to the requirements of this article. In accordance with these procedures and

criteria, the Commission shall identify a host state for the development of a second regional disposal facility within three years after the Commission is constituted as provided for in Article 7(D), and shall seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991.

In developing criteria, the Commission must consider the following; the health, safety, and welfare of the citizens of the party states; the existence of regional facilities within each party state; the minimization of waste transportation; the volumes and types of wastes generated within each party state; and the environmental, economic, and ecological impacts on the air, land, and water resources of the party states.

The Commission shall conduct such hearings, require such reports, studies, evidence, and testimony; and do what is required by its approved procedures in order to identify a party state as a host state for a needed facility.

7. In accordance with the procedures and criteria developed pursuant to Section (E)(6) of this Article, to designate, by a two-thirds vote, a host state for the establishment of a needed regional facility. The

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Commission shall not exercise this authority unless the party states have failed to voluntarily pursue the development of such facility. The Commission shall have the authority to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility.

8. To require of and obtain from party states, eligible states seeking to become party states, and non-party states seeking to become eligible states, data and information necessary to the implementation of Commission responsibilities.

9. Notwithstanding any other provision of this compact, to enter into agreements with any person, state, or similar regional body or group of states for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. The authorization to import requires a two-thirds majority vote of the Commission, including an affirmative vote of both representatives of the host state in which any affected regional facility is located. This shall be done only after an assessment of the affected facility's capability to handle such wastes.

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10. To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes. The authority to act, intervene, or otherwise appear shall be exercised by the Commission, only after approval by a majority vote of the Commission.

11. To revoke the membership of a party state in accordance with Article 7(F).

(F) The Commission may establish any advisory committees as it deems necessary for the purpose of advising the Commission on any matters pertaining to the management of low-level radioactive waste.

(G) The Commission may appoint or contract for and compensate such limited staff necessary to carry out its duties and functions. The staff shall serve at the Commission's pleasure irrespective of the civil service, personnel, or other merit laws of any of the party states or the federal government and shall be compensated from funds of the Commission. In selecting any staff, the Commission shall assure that

the staff has adequate experience and formal training to carry out such functions as may be assigned to it by the Commission. If the Commission has a headquarters it shall be in a party state.

(H) Funding for the Commission must be provided as follows:

1. Each eligible state, upon becoming a party state, shall pay twenty-five thousand dollars to the Commission which shall be used for costs of the Commission's services.

2. Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which:

a. must be sufficient to cover the annual budget of the Commission;

b. must represent the financial commitments of all party states to the Commission;

c. must be paid to the Commission;

Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act.
Pub. L. No. 99-240, Title II, 99 Stat. 1871 (1986)
as amended by 103 Stat. 1289 (1989)

Provided, however, That each host state collecting such fees or surcharges may retain a portion of the collection sufficient to cover its administrative costs of collection and that the remainder be sufficient only to cover the approved annual budgets of the Commission.

3. The Commission must set and approve its first annual budget as soon as practicable after its initial meeting. Host states for disposal facilities must begin imposition of the special fees and surcharges provided for in this section as soon as practicable after becoming party states and must remit to the Commission funds resulting from collection of such special fees and surcharges within sixty days of their receipt.

(I) The Commission must keep accurate accounts of all receipts and disbursements. An independent certified public accountant shall annually audit all receipts and disbursements of Commission funds and submit an audit report to the Commission. The audit report shall be made a part of the annual report of the Commission required by Article 4(E)3.

(J) The Commission may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state, or the

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as amended by 103 Stat. 1289 (1989)

United States, or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm, or corporation, and may receive, utilize, and dispose of the same. The nature, amount, and condition, if any, attendant upon any donation or grant accepted pursuant to this section, together with the identity of the donor, grantor, or lender shall be detailed in the annual report of the Commission.

(K) The Commission is not responsible for any costs associated with:

1. the creation of any facility,

2. the operation of any facility,

3. the stabilization and closure of any facility,

4. the post-closure observation, and maintenance of any facility, or

5. the extended institutional control, after post-closure observation and maintenance of any facility.

(L) As of January 1, 1986, the management of wastes at regional facilities is restricted to wastes generated within the region, and to wastes generated

within non-party states when authorized by the Commission pursuant to the provisions of this compact. After January 1, 1986, the Commission may prohibit the exportation of waste from the region for the purposes of management.

(M)

1. The Commission herein established is a legal entity separate and distinct from the party states capable of acting in its own behalf and is liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states. Members of the Commission shall not personally be liable for action taken by them in their official capacity.

2. Except as specifically provided in this compact, nothing in this compact shall be construed to alter the incidence of liability of any kind for any act, omission, course of conduct, or on account of any causal or other relationships. Generators and transporters of wastes and owners and operators of sites shall be liable for their acts, omissions, conduct, or relationships in accordance with all laws relating thereto.

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as amended by 103 Stat. 1289 (1989)

ARTICLE 5

DEVELOPMENT AND OPERATION OF FACILITIES

(A) Any party state which becomes a host state in which a regional facility is operated shall not be designated by the Compact Commission as a host state for an additional regional facility until each party state has fulfilled its obligation, as determined by the Commission, to have a regional facility operated within its borders.

(B) A host state desiring to close a regional facility located within its borders may do so only after notifying the Commission in writing of its intention to do so and the reasons therefor. Such notification shall be given to the Commission at least four years prior to the intended date of closure. Notwithstanding the four year notice requirement herein provided, a host state is not prevented from closing its facility or establishing conditions of its use and operations as necessary for the protection of the health and safety of its citizens. A host state may terminate or limit access to its regional facility if it determines that Congress has materially altered the conditions of this compact.

(C) Each party state designated as a host state for a regional facility shall take appropriate steps to ensure

that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority.

(D) No party state shall have any form of arbitrary prohibition on the treatment, storage or disposal of low-level radioactive waste within its borders.

(E) No party state shall be required to operate a regional facility for longer than a 20-year period, or to dispose of more than 32,000,000 cubic feet of low-level radioactive waste, whichever first occurs.

ARTICLE 6
OTHER LAWS AND REGULATIONS

(A) Nothing in this compact shall be construed to:

1. Abrogate or limit the applicability of any act of Congress or diminish or otherwise impair the jurisdiction of any federal agency expressly conferred thereon by the Congress.

2. Abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an agreement state under Section

274 of the Atomic Energy Act of 1954 in which a regional facility is located.

3. Make inapplicable to any person or circumstance any other law of a party state which is not inconsistent with this compact.

4. Make unlawful the continued development and operation of any facility already licensed for development or operation on the date this compact becomes effective, except that any such facility shall comply with Article 3, Article 4 and Article 5 and shall be subject to any action lawfully taken pursuant thereto.

5. Prohibit any storage or treatment of waste by the generator on its own premises.

6. Affect any judicial or administrative proceeding pending on the effective date of this compact.

7. Alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions.

8. Affect the generation, treatment, storage or disposal of waste generated by the atomic energy

defense activities of the Secretary of the United States Department of Energy or federal research and development activities as defined in Public Law 96-573.

9. Affect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders or to affect the rights and powers of any party state and its political subdivisions to tax or impose fees on the waste managed at any facility within its borders.

(B) No party state shall pass any law or adopt any regulation which is inconsistent with this compact. To do so may jeopardize the membership status of the party state.

(C) Upon formation of the compact no law or regulation of a party state or of any subdivision or instrumentality thereof may be applied so as to restrict or make more inconvenient access to any regional facility by the generators of another party state than for the generators of the state where the facility is situated.

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(D) Restrictions of waste management of regional facilities pursuant to Article 4 shall be enforceable as a matter of state law.

ARTICLE 7

ELIGIBLE PARTIES; WITHDRAWAL; REVOCATION; ENTRY INTO FORCE; TERMINATION

(A) This compact shall have as initially eligible parties the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

(B) Any state not expressly declared eligible to become a party state to this compact in Section (A) of this Article may petition the Commission, once constituted, to be declared eligible. The Commission may establish such conditions as it deems necessary and appropriate to be met by a state wishing to become eligible to become a party state to this compact pursuant to such provisions of this section. Upon satisfactorily meeting the conditions and upon the affirmative vote of two-thirds of the Commission, including the affirmative vote of both representatives of a host state in which any affected regional facility is located, the petitioning state shall be eligible to become a party state to this compact and may become

a party state in the same manner as those states declared eligible in Section (A) of this Article.

(C) Each state eligible to become a party state to this compact shall be declared a party state upon enactment of this compact into law by the state and upon payment of the fees required by Article 4(H)(1). The Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

(D)

1. The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article 4(H)1 shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission; shall cause legislation to be introduced in the Congress which grants the consent of the Congress to this compact; and shall do those things necessary to organize the commission and implement the provisions of this compact.

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2. All succeeding states eligible to become party states to this compact shall be declared party states pursuant to the provisions of Section (C) of this Article.

3. The consent of the Congress shall be required for full implementation of this compact. The provisions of Article 5 Section (D) shall not become effective until the effective date of the import ban authorized by Article 4, Section (L) as approved by Congress. The Congress may by law withdraw its consent only every five years.

(E) No state which holds membership in any other regional compact for the management of low-level radioactive waste may be considered by the Compact Commission for eligible state status or party state status.

(F) Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state. Any sanction shall be imposed only upon the affirmative vote of at least two-thirds of the Commission members. Revocation of party state status may take effect on the

date of the meeting at which the Commission approves the resolution imposing such sanction, but in no event shall revocation take effect later than ninety days from the date of such meeting. Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

The Commission must, as soon as practicable after the meeting at which a resolution revoking status as a party state is approved, provide written notice of the action, along with a copy of the resolution to the Governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states, as well as chairmen of the appropriate committees of the Congress.

(G) Subject to the provisions of Article 7 Section (H), any party state may withdraw from the compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the Compact. The Commission, upon receipt of the verification, shall as

soon as practicable provide copies of such verification to the Governor, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states as well as the chairmen of the appropriate committees of the Congress.

(H) The right of a party state to withdraw pursuant to section (G) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress. For purposes of this section, the low-level radioactive waste disposal facility located in Barnwell County, South Carolina shall be considered the first host state disposal facility.

(I) This compact may be terminated only by the affirmative action of the Congress or by rescission of all laws enacting the compact in each party state.

ARTICLE 8
PENALTIES

(A) Each party state, consistently with its own law, shall prescribe and enforce penalties against any

person not an official of another state for violation of any provisions of this compact.

(B) Each party state acknowledges that the receipt by a host state of waste packaged or transported in violation of applicable laws and regulations can result in the imposition of sanctions by the host state which may include suspension or revocation of the violator's right of access to the facility in the host state.

ARTICLE 9
SEVERABILITY AND CONSTRUCTION

The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared by a court of competent jurisdiction to be contrary to the Constitution of any participating state or of the United States, or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any other government, agency, person, or circumstance shall not be affected thereby. If any provision of this compact shall be held contrary to the Constitution of any State participating therein, the compact shall remain in full force and effect as to the state affected as to all severable matters. The

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provisions of this compact shall be liberally construed to give effect to the purposes thereof.

No. 132, Original

Supreme Court, U.S.
FILED
JUN 25 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to the Preliminary and Second Reports of the Special Master

EXCEPTIONS BY PLAINTIFFS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

TROY KING
ATTORNEY GENERAL
ALABAMA
BILL MCCOLLUM
ATTORNEY GENERAL
FLORIDA
ROBERT E. COOPER JR.
ATTORNEY GENERAL
TENNESSEE
WILLIAM C. MIMS
ATTORNEY GENERAL
VIRGINIA

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
ANGELA M. XENAKIS
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Plaintiffs
* Counsel of Record
[Additional Counsel Listed on Inside Cover]

June 24, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, N.C. 27605
(919) 828-2501

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Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

EXCEPTIONS BY PLAINTIFFS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

Plaintiffs except to the following conclusions of the Special Master:

1. Article 7(F) of the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"), which states that the Commission may "sanction[ ]" "[a]ny party state which fails to comply with the provisions . . . or . . . fulfill the obligations" of "this compact," does not give the Commission the authority to level monetary sanctions against a party State when it fails to comply with the Compact. Preliminary Report 15-25.

2. Even if North Carolina violated the Compact, it was not subject to the sanctions authority of the Commission because it withdrew from the Compact

before sanctions were imposed. Preliminary Report 25-29.

3. North Carolina did not waive its right to contest the legality of the sanctions proceedings even though it attended and refused to participate in the hearing. Preliminary Report 29-30.

4. Even though the Compact expressly provides that the Commission is "the judge of the [party States'] compliance with the conditions and requirements of this compact," Art. 7(C), the Commission's determination that North Carolina breached the Compact is neither conclusive nor entitled to any deference from the Court. Second Report 19-20.

5. While it is undisputed that North Carolina ceased taking any steps to license a facility in December 1997, more than 18 months before it withdrew from the Compact, North Carolina, as a matter of law, did not breach its duty under the Compact to "take appropriate steps to ensure that an application for a license to construct and operate a facility . . . is filed." Art. 5(C). Second Report 10-24.

6. The implied duty of good faith and fair dealing does not apply to interstate compacts and North Carolina did not withdraw from the Compact in bad faith. Second Report 29-35.

7. North Carolina did not repudiate the Compact when it informed the Commission that it would take no further steps to license a facility. Second Report 24-28.

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PLAINTIFFS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

INTRODUCTION AND SUMMARY OF THE CASE

This case involves a lawsuit brought by several States and the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission") against the State of North Carolina for its failure to fulfill its obligations under the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") to license a waste disposal facility.

Plaintiffs take exceptions to a number of the recommendations made in the Special Master's Preliminary and Second Reports.

In Part I, Plaintiffs show that the Special Master wrongly recommended that this Court find that the Commission lacked authority to impose monetary sanctions on North Carolina. The Compact provides that "[a]ny party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state . . . may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state." Art. 7(F). By its plain terms, this provision includes monetary sanctions. Indeed, this Court has held that the term "sanctions" is broad enough to embrace monetary penalties. The Special Master's conclusion that the phrase "including suspension . . . and revocation" in Article 7(F) limits the Commission's sanctioning authority to only those two remedies is incorrect. "Including" is a term of expan-

sion, not limitation. That is how the Commission read the Compact, and that reading is correct.

The Special Master's conclusion that the Commission lost authority to sanction North Carolina for misconduct committed while a Compact member once North Carolina withdrew from the Compact is equally wrong. The Compact's sanctions provision expressly provides: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F). Thus, by its terms, the Compact provides that the Commission may enforce sanctions against a former party State for the State's acts while a member of the Compact.

In Part II, Plaintiffs show that the Special Master's conclusion that North Carolina did not breach the Compact is wrong as a matter of law. Significantly, the Compact expressly states that the Commission "is the judge" of the party States' compliance with its conditions and requirements. In 1998, the Commission made an authoritative determination that North Carolina breached the Compact when it ceased licensing activities and refused to develop and operate a waste disposal facility for the region. That determination, made pursuant to an express and unambiguous delegation of authority, is conclusive. In reaching his contrary conclusion, the Special Master failed even to address the plain language of the Compact.

At the very least, the Court should defer to the Commission's fully-supported determination that North Carolina breached the Compact. It is undisputed that for approximately a year and a half between the time that North Carolina ceased licensing activities in December 1997 and the time that it withdrew from the Compact in July 1999, North

Carolina failed to take any further steps to license a facility. That refusal constituted nonperformance of North Carolina's most fundamental obligation as a host State and was a total breach of the Compact.

North Carolina also breached the implied covenant of good faith and fair dealing when it withdrew from the Compact. North Carolina induced the other party States to invest eleven years and $80 million[1] in its licensing effort, and then walked away. It cited the Plaintiffs' failure to provide it with further funds as the sole reason, despite the Compact's clear statement that the host State is responsible for the cost of licensing and building the facility. Withdrawal in these circumstances left the States with nothing to show for the enormous investment of time and money they had made in reliance on North Carolina's good faith performance.

In addition, North Carolina repudiated the Compact when it informed the Commission that it would no longer take any steps to license a facility and then instructed the North Carolina Authority to initiate a shutdown of the project. The Special Master did not even address North Carolina's clear statements of repudiation.

North Carolina committed a total breach and repudiation of the Compact by refusing to render the very performance that it agreed to exchange for the other States' performance, defeating the essential purpose of the Compact and depriving the other States of the benefit of their bargain. For these reasons, Plaintiffs are entitled to the enforcement of the sanctions order, or, in the alternative, restitution of the $80 million

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[1] Acting on behalf of the party States, the Commission provided North Carolina with $ 79,917,546.89. For ease of reference, Plaintiffs refer to this amount as $80 million throughout.

benefit they conferred on North Carolina in reliance on the Compact, plus interest.

JURISDICTION

In June 2002, four of the member States of the Compact and the Commission filed a motion for leave to file a Bill of Complaint, which the Court granted. This Court's jurisdiction over this controversy between various States is both original and exclusive. See U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

The Special Master filed his Preliminary and Second Reports with this Court on April 2, 2009. On April 27, 2009, the Court received these Reports and ordered them filed.

STATEMENT OF THE CASE

A. The Southeast Interstate Low-Level Radioactive Waste Management Compact

In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act, which was subsequently amended by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, which ratified the Southeast Interstate Low Level Radioactive Waste Management Compact ("Compact"). See Pub. L. No. 96-573, 94 Stat. 3347 (1980); Pub. L. No. 99-240, tit. II, 99 Stat. 1859 (1986). In these Acts, Congress declared that it is primarily the responsibility of the States to dispose of low-level radioactive waste and encouraged the States to form regional interstate compacts to develop disposal facilities in an efficient and effective manner.

The States formed the Compact "for the purpose of providing the instrument and framework for a cooperative effort [and for] provid[ing] sufficient facilities for the proper management of low-level radioactive

waste generated in the region." Art 1.[2] The Compact, which is both a contract among the member States and a federal law, was formally adopted by Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia, and consented to by Congress on January 15, 1986. Plaintiffs' Statement of Undisputed Material Facts ("Undisputed Facts") ¶¶ 7, 8. The Compact created the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission") consisting of two voting members from each party State. Art. 4(A).

The Compact requires that each party State take a turn at siting and operating a regional facility within its borders. Art. 5(A). Specifically, the Compact requires each State to serve as a "host State" for up to 20 years, or until it has disposed of 32,000,000 cubic feet of low-level radioactive waste. Art. 5(E). By rotating the obligation to provide a regional waste disposal facility among the States, the Compact "limit[s] the number of facilities required to effectively and efficiently manage low-level waste generated in the region," while "distribut[ing] the costs, benefits and obligations of successful low-level radio-

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[2] As discussed *infra*, that purpose has not been met and the management of low-level radioactive waste continues to be a growing public health problem across the country. Few facilities exist to store the material and on-site storage is becoming overrun and increasingly dangerous. *See* Katherine Ling, *Low-Level Waste Emerges as Hurdle for New Nuclear Reactors*, N.Y. Times, Mar. 16, 2009, *available at* http://www.nytimes.com/allbusiness/16greenwire-lowlevel-waste-emerges-as-hurdle-for-new-react-10146.html?pagewanted=1. North Carolina's refusal to fulfill its obligations under the Compact thus, not only breached the contract with the other Compact States but exposed all of the states to serious health hazards by delaying the creation of a disposal facility for more than two decades.

active waste management equitably among the party states." Art. 1.

The Compact imposes specific duties on the host State. It mandates that "[e]ach party state designated as a host State for a regional facility shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Art. 5(C). The Compact also declares that "[h]ost states are responsible for the availability, the subsequent post closure observation and maintenance, and the extended institutional control of their regional facilities." Art. 3(C); cf. Art. 4(K).

Under the Compact, the first regional disposal facility was the facility previously built and licensed in Barnwell County, South Carolina, which was to serve as the regional facility until December 31, 1992. Art. 7(H). The Compact authorized the Commission to develop and implement procedures and criteria to identify a host State for the development of a second regional disposal facility. Art. 4(E)(6). The Compact expressly states, however, that "[t]he Commission is not responsible for any costs associated with," *inter alia*, "the creation of any facility." Art. 4(K).

The Commission also has certain powers related to the enforcement of the Compact. For example, the Compact expressly provides that "the Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of th[e] compact." Art. 7(C). The Commission may also "sanction[ ]" a noncompliant state, "including suspension of its rights under this compact and revocation of its status as a party state." Art. 7(F).

B. The Present Controversy

In September 1986, by a two-thirds majority vote, the Commission selected North Carolina as the second host State. Undisputed Facts ¶ 17. Thereafter, the North Carolina General Assembly enacted a law establishing a siting authority, the North Carolina Low-Level Waste Management Authority (the "Authority"). N.C. Gen. Stat. § 104G, 1987 N.C. Sess. Laws ch. 850 (App. 29-58).[3]

In its enabling statute, North Carolina recognized and accepted its obligation under the Compact to "site, finance, [and] build" a facility to receive the region's low-level radioactive waste for disposal. N.C. Gen. Stat. § 104G-4 (repealed 2000) (App. 34). The North Carolina statute further provided that the State would be repaid for its expenses from revenues generated by the facility, once operational. See *id.* § 104G-15(a) (App. 45) (expressing intent that costs will ultimately be borne by generators served by the facility "established under this Chapter"); *id.* § 104G-15(b)(2), (5), & (8) (App. 45). Pursuant to its obligation, North Carolina appropriated funds from the General Assembly and began the site-selection process. Undisputed Facts ¶ 18.

Thereafter, North Carolina requested that the Commission provide financial assistance. Although

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[3] Unless otherwise indicated, Appendix pages 1-470 are attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment; Appendix pages 471-514 are attached to Plaintiffs' Opposition to Defendant North Carolina's Motion for Summary Judgment; Appendix pages 515-57 are attached to Plaintiffs' Brief in Opposition to Defendant North Carolina's Motion and Supplemental Brief for Summary Judgment; and Appendix pages 559-69 are attached to Plaintiffs' Reply to Defendant North Carolina's Opposition to Plaintiffs' Supplemental Brief for Summary Judgment.

not obligated to do so, the Commission, on behalf of the party States, began providing funds to North Carolina in 1988 to assist with the development of a facility. Undisputed Facts ¶¶ 20-21; Feb. 9, 1988, Resolution (App. 63-65). All parties were fully aware at this time that the Commission had no obligation to provide funds. Undisputed Facts ¶ 21; see also Mar. 28, 1988, Gov. Martin letter to Hodes (App. 69) ("I have been informed that the Southeast Compact has established a Host State Assistance Fund to assist . . . with financial costs . . . ." However, "the [North Carolina] Authority is responsible for siting, financing, building, . . . operating, . . . and closing this regional facility.").

Indeed, the Authority made a series of requests for funding in specific amounts, each time with the understanding that the Commission was not obligated to provide it, and that the Commission could refuse to grant the Authority's funding requests. See McMillan Dep. at 40:13-:17 (App. 470). Over the next eleven years, the Commission provided approximately $80 million to North Carolina to assist it in fulfilling its responsibility to site and license the project. The funds were generated through "surcharges on all users of [the Barnwell regional disposal] facility" and "represent[ed] the financial commitments of all party states," as defined by the Compact. Art. 4(H)(2) & (2)(b).

During this same period, North Carolina experienced a series of project delays and cost increases. Undisputed Facts ¶¶ 25, 29, 35. Consequently, in June 1992, the South Carolina Legislature voted to allow the Barnwell facility to remain open until January 1, 1996. *Id.* ¶ 30. By December 1994, due to additional delays, the North Carolina facility was not projected to open until 1998. *Id.* ¶ 36. Throughout

this period, North Carolina received the benefits of Compact membership, such as the ability to dispose of its waste at the facility in South Carolina.

As time passed South Carolina seriously doubted that North Carolina would ever open the second regional facility, and in July 1995, lawfully withdrew from the Compact. *Id.* ¶ 40. On January 5, 1996, Commission Chairman Hodes wrote to North Carolina Governor Hunt to explain that the Commission had contributed $55 million to North Carolina in furtherance of the waste facility project, but that additional Commission funds would eventually be unavailable because South Carolina's withdrawal meant that the Commission would no longer be able to collect the surcharges imposed at Barnwell. Chairman Hodes encouraged Governor Hunt to begin considering alternative funding sources, consistent with North Carolina's obligations under the Compact. *Id.* ¶ 42; see Jan. 5, 1996, Hodes letter to Hunt (App. 215).

Governor Hunt responded that he "would not recommend" that North Carolina appropriate the funds necessary to continue the project. Apr. 8, 1996, Hunt letter to Hodes (App. 224). Chairman Hodes sent several subsequent letters to Governor Hunt reminding him that, by law, the designated host State is responsible for siting, licensing, building and operating the facility, and that this responsibility includes providing the necessary funding. See, *e.g.*, Apr. 25, 1996, Hodes letter to Hunt (App. 225-26); May 10, 1996, Hodes letter to Hunt (App. 227).

On June 14, 1996, Governor Hunt informed the Commission that "North Carolina is not prepared to assume a greater portion of the project costs. If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not

be able to proceed." June 14, 1996, Hunt letter to Hodes (App. 236); Undisputed Facts ¶ 44. Governor Hunt did not address the Commission's position or the Compact language stating that the Commission is "not responsible for any costs associated with . . . the creation of any facility." Art. 4(K).

The Commission then organized a Task Force for Facility Funding (the "Task Force"), which included representatives from North Carolina, to study the issue and make recommendations for funding alternatives. Undisputed Facts ¶ 48. A group of regional waste generators developed a draft Memorandum of Understanding ("MOU"), which incorporated the Task Force's funding recommendations. *Id.* ¶ 52.

The Commission transmitted the draft MOU to Governor Hunt in August 1997. Undisputed Facts ¶ 52; Sturgeon Mem. & Draft MOU (App. 289-304). Under the proposed MOU, the Commission would have expended the remainder of its funds, up to $22.5 million, and generators would have provided loans for the $7-9 Million projected shortfall in funds required to complete the licensing phase of the project. Draft MOU 3 (App. 294). Upon transmission of the proposed MOU, the Commission asked the North Carolina Authority either to endorse the proposal or to propose an alternative method of funding. Undisputed Facts ¶ 53; Aug. 29, 1997, Hodes letter to Corgan (App. 308).

By December 1, 1997, North Carolina had neither endorsed the MOU nor proposed any other funding plan. Undisputed Facts ¶ 54. Instead, the North Carolina Authority notified the Commission of the Authority's decision to "commence the orderly shutdown of the project," pending the Commission's reversal of its position regarding funding or different instructions from the North Carolina Legislature.

See Dec. 19, 1997, Corgan letter to Hodes (App. 319); Undisputed Facts ¶ 55. Thus, North Carolina conditioned its continued performance on more funding from the Commission, a demand that contradicted the express terms of the Compact. See Art. 4(K).

The Commission notified the North Carolina Authority in January 1998, and again in April 1999, that it had determined the shutdown constituted a breach of the Compact by North Carolina. Undisputed Facts ¶¶ 56-57. North Carolina took no action in response and, by its own admission, "did not [after December 1997] take additional steps to site, characterize, and, ultimately, license a waste disposal facility."[4] North Carolina's Admissions ¶ 11; Undisputed Facts ¶¶ 57-58.

On June 21, 1999, the Commissioners of the States of Florida and Tennessee filed with the Commission a Sanctions Complaint against North Carolina. Undisputed Facts ¶ 58. The Sanctions Complaint alleged that

> [b]y its actions to cease all activities in pursuit of a license to build the second regional low-level radioactive waste (LLRW) disposal facility for the Southeast Interstate Low-Level Radioactive Waste Compact (Compact), the State of North Carolina has failed to fulfill its obligations . . . to provide a disposal facility for the Southeast region.

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[4] Indeed, the Authority ceased operation prior to any licensing determination. See Def. Mot. Summ. J. at 7 ("Ultimately, no license was issued because, at the time the Commission stopped providing funding support for the Authority's efforts in 1997, the DRP had not yet determined that the site could be safely licensed.").

Sanctions Compl. (App. 325). The Sanctions Complaint requested, *inter alia*, return of the $80 million in funds the Commission, on behalf of the party States, had provided to North Carolina to assist in the licensing and development of the disposal facility, plus interest from the date North Carolina ceased activities to develop the facility. Undisputed Facts ¶ 58; Sanctions Compl. (App. 327).

On July 26, 1999, North Carolina purported to exercise its rights under Article 7(G) of the Compact to withdraw from the Compact. Undisputed Facts ¶ 59; 1999 N.C. Sess. Laws ch. 357. North Carolina claimed that it "had no option but to" withdraw as a result of the Commission's breach of the Compact (by terminating supplemental funding as of December 1, 1997). Dec. 1, 1999, Easley letter to Hodes (App. 339).

In August 1999, the Commission initiated a formal inquiry into the Sanctions Complaint filed against North Carolina. Undisputed Facts ¶ 60. The North Carolina Attorney General asserted that, having withdrawn from the Compact, North Carolina was no longer subject to the Commission's jurisdiction. *Id.* ¶ 62; see Dec. 1, 1999, Easley letter to Hodes (App. 340). The Attorney General also informed Chairman Hodes that North Carolina would not participate in the sanctions proceeding. Dec. 1, 1999, Easley letter to Hodes (App. 340).

The Commission held a Sanctions Hearing on December 8, 1999 presided over by retired D.C. Superior Court Judge Curtis VanKann. Undisputed Facts ¶ 63; Sanctions Hr'g Tr. (App. 341-98). The Commission heard testimony and received documentary evidence from the States of Florida and Tennessee. Sanctions Hr'g Tr. 16-72 (App. 347-61). All Commissioners were permitted to ask questions and make

comments. *Id.* at 1-144 (App. 344-79). Comments also were received from members of the public. *Id.* at 7-8, 97-98 (App. 345, 368). In addition, North Carolina had a representative from its Office of the Attorney General present at the hearing and was provided the opportunity to offer testimony or other evidence on its behalf. North Carolina declined to exercise its right to participate in the hearing.

By a unanimous vote of those participating, the Commission determined, pursuant to Article 7(C) of the Compact, that North Carolina had "failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party state to th[e] Compact." Undisputed Facts ¶ 64; Dec. 9, 1999, Sanctions Res. (App. 412). Consequently, the Commission voted to require North Carolina to repay the approximately $80 million in funds it had received from the party States via the Commission, plus interest. Sanctions Res. (App. 412). The Commission also determined that according to its authority under Article 7(F), it had the authority to level sanctions against North Carolina even after it had withdrawn from the Compact. *Id.*; see also Art. 7(F) ("Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction."). The Commissioners unanimously adopted a resolution directing the Commission to work with outside counsel to represent the party States in court against North Carolina, in the event that North Carolina failed to comply with sanctions. Undisputed Facts ¶ 64; Dec. 9, 1999, Sanctions Res. (App. 412). North Carolina did not comply.

C. Judicial Proceedings

After this Court denied an initial motion for leave to file a bill of complaint naming only the Commission as plaintiff, four member States of the Compact and the Commission filed a motion for leave to file a Bill of Complaint in June 2002. This Court granted that motion; the Bill of Complaint was deemed filed; and North Carolina was ordered to respond to the Complaint.

North Carolina filed a motion to dismiss the Commission as a party, arguing that North Carolina's sovereign immunity barred the Commission's claims. The Supreme Court referred this matter to the Special Master.

Before the Special Master, Plaintiffs filed a motion for summary judgment, seeking enforcement of the Commission's sanctions order. North Carolina filed a motion to dismiss the Bill of Complaint, arguing that the Compact did not authorize the Commission to impose monetary sanctions; that North Carolina was no longer subject to the Commission's jurisdiction; and that the only remedies available to Plaintiffs were those provided in the Compact.

In June 2006, the Special Master issued a Preliminary Report, recommending that North Carolina's motion to dismiss the Commission be denied, that Plaintiffs' motion for summary judgment be denied, and that North Carolina's motion to dismiss the Bill of Complaint be granted in part and denied in part.

With respect to North Carolina's motion to dismiss the Commission, the Special Master recommended that the Commission be allowed to participate in the action because it asserts the same claims and seeks the same relief as the Plaintiff States. Preliminary

Report 13 (citing *Arizona* v. *California*, 460 U.S. 605 (1983)).

As to Plaintiffs' motion for summary judgment, the Special Master recommended that the motion "be denied because the Compact does not authorize the Commission to impose monetary sanctions against member States, and because North Carolina withdrew from the Compact prior to the imposition of sanctions." *Id.* at 14. The Special Master noted, however, that "[d]enial of Plaintiffs' motion . . . merely means that the Commission's sanctions order should not be summarily enforced. It does not mean that North Carolina faces no potential liability as a matter of law with respect to the Plaintiffs' other claims" for breach of contract and the common law. *Id.* at 14-15.

As to North Carolina's motion to dismiss the Bill of Complaint, the Special Master recommended that the motion be granted with respect to the Plaintiffs' request that the sanctions order be enforced. *Id.* at 38. With respect to the remainder of the Bill of Complaint, the Special Master recommended that North Carolina's motion be denied. *Id.* The Special Master rejected North Carolina's argument that the remedies provided in the Compact are the exclusive remedies available for breach of the Compact. *Id.* at 33-36. Accordingly, he found that "further proceedings [were] necessary to determine whether North Carolina in fact breached its obligations under the Compact." *Id.* at 36.

The parties did not seek this Court's immediate review of the Preliminary Report. Instead, they engaged in discovery, which eventually was suspended in order to file cross-motions for summary judgment. Plaintiffs moved for summary judgment with respect to the Breach of Compact count on the grounds that

North Carolina breached the Compact and that Plaintiffs are entitled to restitution of the $80 million the States provided North Carolina in reliance on the Compact, plus interest. North Carolina moved for summary judgment on all of Plaintiffs' claims.

In his Second Report, the Special Master recommended that this Court find that North Carolina did not breach the Compact. According to the Special Master, the Compact's requirement that a host State take "appropriate steps" to license a facility is ambiguous; and, under the Compact as modified by the parties' course of performance, North Carolina took the appropriate steps required by the Compact. Second Report 10-28. The Special Master also decided that North Carolina's withdrawal did not violate its implied covenant of good faith and fair dealing. He concluded that (i) the covenant of good faith, read into all contracts, probably should not be read into interstate compacts, and (ii) if it were, North Carolina's decision to cease performance when the Commission ceased paying did not breach that duty. *Id.* at 29-35. Thus, the Special Master recommended that this Court deny Plaintiffs' Motion for Summary Judgment on Breach of Contract and grant North Carolina's Motion for Summary Judgment on that count.[5]

The Special Master filed both his Preliminary and Second Reports with this Court. He noted that the remaining claims were alternatives to Plaintiffs' breach of contract claims, which would not be liti-

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[5] In addition, the Special Master recommended that North Carolina's Motion for Summary Judgment on Unjust Enrichment, Promissory Estoppel, and Money Had and Received be denied as requiring further briefing and argument and, potentially, further discovery. *See* Second Report 41.

gated if this Court rejected his recommendations on the claims for sanctions and breach of contract. *Id.* at 48-49.

On April 27, 2009, the Court received and ordered filed the Reports of the Special Master, and ordered the Parties to file Exceptions.

ARGUMENT

I. THE COMMISSION'S SANCTIONS ORDER SHOULD BE ENFORCED.

A. The Compact Authorizes The Commission To Impose The Sanction Of Restitution.

The Compact provides:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be *subject to sanctions by the Commission*, including suspension of its rights under this compact and revocation of its status as a party state.

Art. 7(F) (emphasis added).

After a formal evidentiary hearing – at which North Carolina was in attendance but refused to participate – the Commission determined that North Carolina had "failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party to th[e] Compact." Dec. 9, 1999 Sanctions Res. (App. 412); Undisputed Facts ¶ 64. The Commission made this determination pursuant to its authority as "the judge of [the party States'] compliance with the conditions and requirements of this compact." Art. 7(C). As set forth in

detail *infra* at II.A, this determination of breach is conclusive or, at the very least, entitled to deference. [6]

Following the Commission's determination of breach, it imposed a monetary sanction. In doing so, it necessarily interpreted the Compact to give it this authority. This interpretation is reasonable and is, indeed, the best reading of the Compact language. Pursuant to this Court's precedent, ordinary usage, and the specific context, the term "sanctions" includes monetary sanctions; and thus, the Commission's sanction's order should be given effect by this Court. See *U.S. Dep't of Energy* v. *Ohio*, 503 U.S. 607, 621 (1992).

Instead, the Special Master decided that the Compact clause providing that sanctions "includ[e] suspension of [a State's] rights under this compact and revocation of its status as a party state" was intended to dramatically narrow the Commission's authority to impose sanctions. He disregarded the Commission's reading of this Compact provision and read the clause *de novo* to indicate that the Commission could suspend or expel members, but could not fine a member or impose other monetary sanctions. Thus, the Special Master concluded that the sole sanction that the Commission could impose on a host State that breaches its obligations and then withdraws is expulsion. But this "sanction" gives that State precisely what it wants – to avoid its obligation to host a waste disposal facility. Preliminary Report 28.

The Special Master gave four reasons for his conclusion. Each lacks merit.

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[6] The Commission "is the judge" of the party States' compliance with the Compact, Art. 7(C), and thus is entitled to determine whether a party state has breached the Compact. *See infra* at II.A.

First, the Special Master asserted that "including," in the Compact, actually means "limited to" and, therefore, the "sanctions" available do not include monetary awards. But, application of this Court's precedent, scholarly consensus, and common sense lead to the conclusion that the term "including" here does not limit the sanctions to those listed or preclude monetary sanctions. A sanction is "[a] penalty or coercive measure that results from failure to comply with a law, rule, or order." *Black's Law Dictionary* 1341 (7th ed. 1999). This Court has stated that when a sovereign submits itself to "sanctions," it is thereby subject to monetary sanctions of one variety or another: "As a general matter, the meaning of 'sanction' is spacious enough to cover . . . punitive fines . . . ." *U.S. Dep't of Energy*, 503 U.S. at 621. Moreover, "[w]hen 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded." 2A Norman J. Singer & J.D. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (7th ed. 2004). This is because "'the word "includes" is usually a term of enlargement, and not of limitation.'" *Id.* at § 47.7. As this Court recognized in *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985), "[b]y use of the term 'including' Congress indicated that the specifically mentioned [items] are not exclusive." Therefore, the "including" clause should not be construed to limit the imposition of other appropriate sanctions.

The Special Master also failed to give weight to the entirety of the sanctions provision. The Compact's sanctions provision concludes: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F).

The Compact thus necessarily authorizes some sanction that can be applied to a party state that ceases to be a party after the sanction is imposed. This provision is meaningless if one accepts the Special Master's reading that sanctions are limited to suspension or revocation of a party State's membership status; neither of these sanctions would be relevant to a State that has already withdrawn.

As a whole, Article 7(F) is best read to authorize the Commission to assess monetary sanctions against the Defendant. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.")

Second, the Special Master concluded that the Compact must contain a "clear statement" that authorizes monetary sanctions against a State. Initially, as explained above, the Compact *does* clearly provide for monetary sanctions. But even if it did not, it is inappropriate to impose a clear-statement rule on the interpretation of a contract among coequal sovereign states.

The Special Master pointed to Article 3, which reads, in part: "The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit, or abridge those rights." The Special Master then contended that in light of this provision, the Court should read an implied clear-statement rule into the Compact – *i.e.*, a rule that without a "clear statement," monetary sanctions are not allowed. Preliminary Report 18. For several reasons, this reading is incorrect.

Article 3 neither states nor implies a clear-statement rule. And "courts have no power to substitute their own notions" in place of the text of the Compact. *Texas* v. *New Mexico*, 462 U.S. 554, 568 (1983) (quotation marks omitted). Additionally, imposing a clear-statement rule would run afoul of another Compact provision, Article 9, which provides: "The provisions of this compact shall be liberally construed to give effect to the purposes thereof." Finally, the Special Master's interpretation of Article 3 appears to be based on a special solicitude for states' rights, which is – at most – appropriate when states contract with private parties; it is not, however, appropriate when states contract with coequal sovereigns.

Third, the Special Master sought to narrow the Commission's sanctions power by comparing the Southeast Compact's language with that of other compacts. He noted that other compacts use the words "fines" or "sum," and that those words authorize the relevant compact commission to impose monetary sanctions. The Special Master contended that the express reference to monetary sanctions in other compacts means that the absence of such a reference in the Southeast Compact indicates that such sanctions were excluded. Preliminary Report 22.

The general presumption, that such differences, when found within a single federal statute, are significant, does not apply here. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Congress authorized independent regional negotiation of low-level radioactive waste compacts. And, each compact was negotiated independently. There is no evidence in this record that any compact negotiators were informed about either the negotiation or text of the other compacts. There is simply no basis for any interpretation

of the language of the Southeast Compact by comparing it to the text of other regional Compacts.[7]

In any event, the comparison of the regional Compacts' sanctions language yields conflicting results. For example, the Southeast Compact and the Northeast Compact are the only compacts that generally authorize "sanctions." Northeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 227, Art. IV(I)(14), 99 Stat. 1909, 1915 (1986). The Rocky Mountain Compact does not authorize sanctions generally; it allows only exclusion. Rocky Mountain Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 226, Art. VIII(e), 99 Stat. 1902, 1909 (1986). Under the Special Master's reasoning, the absence of the term "sanctions" in the Rocky Mountain Compact and its inclusion in the others would mean that the Rocky Mountain Compact generally forbids sanctions. And, the Southeast Compact and Northeast Compact's broader provision – their general authorization of sanctions – should mean that these compacts authorize sanctions *beyond* exclusion. But, the Special Master ignored those comparisons. In sum, this interpretation by comparing sanctions clauses is an arbitrary methodology that should not be used, particularly when it does violence to the plain language of the Compact.

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[7] In *Texas* v. *New Mexico*, 462 U.S. at 565, this Court cited the text of contemporaneously negotiated compacts to support its reading. But, here, the undisputed record shows that the party States were not aware of the language of other interstate low-level radioactive waste compacts when they negotiated the Southeast Compact. *See* Setser Dep. Tr. at 14-15 (App. 498) (Testimony by Mr. Setser, the 30(b)(6) deponent for the Commission and one of the initial drafters of the Compact).

Fourth and finally, the Special Master expressed concern that Plaintiffs' interpretation would allow the Commission to issue sanctions without limitation. Preliminary Report 18. But, general laws authorizing remedies and penalties routinely do so without express limits on the amount or types of relief. See, *e.g.*, 42 U.S.C. § 1983; *id.* § 2000e-5(g)(1). Courts regularly interpret such laws, limiting damages to compensatory damages or reasonable punitive damages, and allowing some injunctions and not others. We are aware of no authority that the absence of an express limit on damages or penalties renders simple monetary fines wholly unavailable. In fact, the Special Master cited the Northeast Compact as an example of a Compact that provides for damages, see Preliminary Report 22, even though it lacks any express limit on damages. Northeast Compact, § 227, Art. IV(I)(14), 99 Stat. at 1915.

The Compact should be read to authorize the sanctions that the Commission voted to impose.

B. North Carolina Cannot Escape Sanctions For Its Conduct As A Compact Member By Withdrawing From The Compact.

The Special Master's conclusion that North Carolina may evade sanctions by withdrawing on the eve of its sanctions hearing is mistaken and contrary to both the Compact's text and the Commission's determination, which is entitled to deference. See *supra* at 18; *infra* at 28-30.

As noted, Article 7(F), the Compact's sanction provision, specifies: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commis-

sion imposing the sanction." Thus, the Compact text provides a straightforward answer to the question whether withdrawal prevents the Commission from imposing sanctions. Apart from noting Plaintiffs' reliance on this provision, the Special Master did not even mention this text, let alone explain why it does not govern resolution of this question. Instead, he concluded that North Carolina may render the Compact a nullity by allowing the host State to immunize itself from any sanction simply by withdrawing.

The Special Master's Report suggested two reasons for his recommendation. First, he implied, without explicitly saying, that the Southeast Compact, unlike other Compacts, does not "authorize imposition of sanctions on States even after they have withdrawn." Preliminary Report 26. Here, he is simply wrong; Article 7(F) of the Southeast Compact does provide such an authorization.

Next, the Special Master cited other Compacts that include limits on withdrawal to indicate that the Southeast Compact does not limit withdrawal. From this he concluded that a state has unlimited discretion to withdraw to escape a sanctions ruling. Preliminary Report 26-27 (citing Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, Art. VIII(d), 99 Stat. 1880, 1891 (1986) and Midwest Interstate Low-Level Radioactive Waste Management Compact, Pub. L. 99-240, Art. VIII(e), 99 Stat. 1892, 1900 (1986)). The Special Master's premise does not support his conclusion. Plaintiffs agree that North Carolina can withdraw from the Compact. But, North Carolina's withdrawal does not relieve it of previously incurred obligations, including sanctions obligations, arising out of its status as a party for conduct that occurred while it was a party. See *NLRB* v. *Granite State Joint Bd.*,

Textile Workers Union of Am., Local 1029, 409 U.S. 213, 216 (1972) ("[T]he law which normally is reflected in our free institutions [is] the right of the individual to join or to resign from associations, as he sees fit subject of course to any financial obligations due and owing the group with which he was associated.") (quotation marks omitted).

Neither the Compact's text nor settled legal principles support the Special Master's recommendation that North Carolina is permitted to escape sanctions for its conduct as a member by withdrawing. Nor would such an outcome further the purposes of the Compact. Art. 9. If a party state can simply walk away from the consequences of misbehavior as a member there is little incentive to act for the good of the region. Instead, there is every incentive to take what the Compact offers, violate the Compact until the other members decline to tolerate it, and then abandon the shared enterprise without consequence. Any such Compact "would, indeed, have been madness" and that is reason enough not to interpret the Compact to permit this result. *United States* v. *Winstar Corp.*, 518 U.S. 839, 910 (1996) (plurality opinion).

II. NORTH CAROLINA BREACHED THE COMPACT.

A. The Commission's Determination That North Carolina Breached The Compact Is Conclusive Or, In The Alternative, Entitled To Deference.

The Compact expressly and unequivocally provides that "[t]he Commission *is the judge* of [the party States'] compliance with the conditions and requirements of this compact." Art. 7(C) (emphasis added). In January 1998, and again, in April 1999 – before

North Carolina's withdrawal – the Commission exercised this authority and determined that North Carolina breached the Compact when, after soliciting $80 million to fulfill its Compact obligations, it ceased performance and refused to fulfill its obligation as host State to develop and operate a regional waste disposal facility. See Jan. 12, 1998, Hodes letter to Corgan (Joint Supp. Fact Br. App. 55) ("It is the stated position of the Commission that this constitutes a breach of the compact law by the State of North Carolina, which is obligated to proceed with the funding and the establishment of the facility."); see also Apr. 26, 1999, Hodes letter to Hunt (App. 323). The Commission reiterated this determination after North Carolina withdrew from the Compact. Dec. 9, 1999 Sanctions Res. (App. 412) ("North Carolina failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party state to this Compact."). Under the Compact, as agreed to by North Carolina, the Commission's determination of breach is conclusive.

When faced with a dispute arising from an interstate compact, this Court looks first and foremost to the language of the compact. *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998). The express terms of the compact are determinative. *Id.* Where the compact's terms specify the extent and limits of the Court's role in adjudicating disputes arising out of the compact, those terms are controlling. *Texas*, 462 U.S. at 567-68 ("The question for decision, therefore, is what role the . . . Compact leaves to this Court.").

Here, the express terms of the Compact are clear: Congress and the party States vested the Commission with the sole power to "judge" whether a party State breached the Compact. Art. 7(C). Thus, under the Compact, any court addressing a claim that in-

volves the question whether a party State has breached the Compact should accept the Commission's judgment of breach or non-breach. Cf. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 623 (2006) ("[C]omplete deference is owed [a] determination" made by the President under a statute granting him authority to make such a determination.); *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 804 (1995) (Art. I, § 5, cl. 1 of the Constitution, which provides that "'[e]ach House *shall be the Judge* of the Elections, Returns and Qualifications of its own Members,'" gives Congress "the final say.") (emphasis added).

This concept has deep roots in the common law of contracts. See 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 31:5, at 298-99, 303-05 (4th ed. 1999) ("[T]he courts properly and steadfastly reiterate the well-established principle that it is not the function of the judiciary to change the obligations of a contract which the parties have seen fit to make. . . . Thus, when interpreting a contract, a court may not delete contractual provisions . . . even if the resulting contract would be economically more efficient or advantageous to one or both parties, or more fair or equitable than the agreement the parties were satisfied to make."). This Court should enforce the Compact's express agreement and statutory mandate that the Commission is the "judge" of breach.

In his decision, the Special Master never addressed the explicit language of Article 7(C). Instead, he erroneously implied that the question of the Commission's authority to judge breach was determined in the Preliminary Report. See Second Report 19. In fact, the Preliminary Report analyzed only Article 7(F) and the Commission's authority to sanction party States – not Article 7(C) and the Commission's

authority to determine breach, whether enforceable through sanctions or through a claim for breach of Compact in the courts. The question whether the Commission has authority to *sanction* party States is wholly independent of the question whether the Commission has the authority conclusively to determine a member's *breach*. The latter authority arises from Article 7(C) of the Compact – a part of the agreement never addressed in either the Preliminary or Second Report.

If, however, this Court concludes that a court addressing a claim of breach must engage in some review of the Commission's judgment, that review should be highly deferential. The D.C. Circuit has held that the actions of an interstate compact commission, when reviewable at all, should be reviewed under the Administrative Procedure Act's ("APA's") deferential arbitrary-and-capricious standard. See *Old Town Trolley Tours of Wash., Inc.* v. *Wash. Metro. Area Transit Comm'n*, 129 F.3d 201, 204 (D.C. Cir. 1997) ("[O]ur review should not be *de novo*. That would deprive the Commission's judgment of importance and would, in effect, place the court in the position of the licensing authority."); see also *Organic Cow, LLC* v. *Ne. Dairy Compact Comm'n*, 164 F. Supp. 2d 412, 423-25 (D. Vt. 2001) (applying the arbitrary-and-capricious standard of review to the decision of an interstate compact commission), *vacated on other grounds sub nom.* 335 F.3d 66 (2d Cir. 2003). This was so, the court reasoned, not because an interstate compact commission is a federal agency subject to the APA, but because the APA's codification of the arbitrary-and-capricious standard "merely restated the present law as to the scope of judicial review." *Old Town Trolley*, 129 F.3d at 205 ("[F]ederal judicial review of agency action according to the standards

just quoted is so commonplace that . . . it would have been natural to assume that courts would treat Commission decisions in the same manner.").

In *Old Town Trolley*, the compact at issue was silent as to the arbiter of disputes, and the D.C. Circuit nonetheless applied a deferential standard of review. Here, the Compact expressly provides that the Commission "is the judge . . . of [party States'] compliance with the conditions and requirements of this compact." Art. 7(C). Accordingly, the Commission's determination, if reviewable at all, should be set aside only if arbitrary or capricious. And, far from arbitrary or capricious, the Commission's determination that North Carolina breached the Compact is, as shown *infra*, correct.

The Special Master was concerned that deference to the Commission's decision would be inconsistent with this Court's original jurisdiction. See Second Report 19-20. The opposite is true. This Court has emphasized the need to enforce compacts by their express terms. See *supra* at 26. Indeed, in *Texas*, the Court limited its deference to the compact commission because of the specific terms of the compact at issue – not because of any concern about the nature of its original jurisdiction. See 462 U.S. at 568 & n.14 (original jurisdiction did not "militate against New Mexico's theory" of deference, rather the compact expressly provided that the commission's determinations "shall *not* be conclusive in any court") (emphasis added). Here, the Compact's express terms state that the Commission "is the judge" of whether a party has complied with the terms of the Compact.

This Court routinely upholds deferential review when commanded by statute and/or contract without any negative implication for the dignity of its jurisdiction. For example, when parties to a contract

agree to submit their disputes to arbitration, judicial review of the arbitrator's award is strictly limited. See, *e.g.*, *United Steelworkers of Am.* v. *Am. Mfg. Co.*, 363 U.S. 564, 567-58 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.").

Here, the parties agreed that the Commission would be the arbiter of their differences concerning breach.[8] A reviewing court's role, therefore, is limited by statute and contract, just as in arbitration. The Commission's determination that North Carolina breached the Compact should be accepted and affirmed by this Court.

B. North Carolina Breached The Compact By Failing To Take "Appropriate Steps" To Fulfill Its Obligations As Host State.

As host State, North Carolina was required to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the des-

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[8] The Special Master asserted that the Commission was biased against North Carolina in determining breach. *See* Second Report 19. That accusation is incorrect and without basis in the record. North Carolina assisted in creating the process for determining breach, both during the original Compact negotiations and in chairing the Committee that created the Administrative Sanctions Procedure. Undisputed Facts ¶ 63. North Carolina knew the membership of the Commission and its role as the arbiter of breach. The hearing was presided over by retired Judge VanKann. North Carolina was also given the opportunity to participate in the Commission's determination and never raised bias as an issue until long after the Commission's determination, *id.*, thus, forfeiting this claim. *See Fid. Fed. Bank, FSB* v. *Durga MA Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (party's failure to object to partiality of an arbiter with a known conflict until after the arbiter's determination waives the party's ability to challenge) (collecting cases).

ignated type [was] filed with and issued by the appropriate authority." Art. 5(C). North Carolina assumed this duty when it was designated as host State in 1986, and that duty remained in force at least until North Carolina withdrew from the Compact in July 1999.

The Special Master recognized, however, that North Carolina's "efforts to complete the licensing process essentially ceased at the end of 1997." Second Report 18. Indeed, in December 1997, North Carolina voted to shut down the waste facility project, and, by its own admission, refused to take further steps to license a facility. See North Carolina Admissions ¶ 11 (after December 1997, "the Authority *did not thereafter take additional steps* to site, characterize, and, ultimately, license a waste disposal facility.") (emphasis added); Undisputed Facts ¶ 56; see also Second Report 10 ("The parties do not dispute that North Carolina did not take additional steps to pursue a license for a waste facility [from December 1997 until it withdrew].").

That fact – that as of December 1997, North Carolina refused to pursue the license to build the regional low-level radioactive waste disposal facility – necessarily means that North Carolina breached its Compact obligation to take "appropriate steps" towards licensing. As a matter of law, North Carolina's failure to do so constituted non-performance of its express duty under Article 5(C). See *Franconia Assocs.* v. *United States*, 536 U.S. 129, 142-43 (2002) ("Failure by the promisor to perform at the time indicated for performance in the contract establishes an immediate breach."); see also *Restatement (Second) of Contracts* § 235(2) (1981) ("When performance of a duty under a contract is due *any non-performance* is a breach.") (emphasis added); 23 Williston & Lord,

supra, § 63:1, at 436 ("[W]hen performance is due, anything short of full performance is a breach.").[9] The Commission, therefore, is entitled to a judgment of breach.

The Special Master declined to adopt this straightforward interpretation of North Carolina's obligation to take "appropriate steps." Instead, he found the term ambiguous and, by examining the parties' course of performance, ultimately concluded appropriate steps included doing nothing towards licensing a facility. The Special Master's analysis is wrong for several reasons, as set forth below. Indeed, it is hard to imagine how a party who ceases performance altogether could be taking "appropriate steps" towards fulfilling its obligations as the host State.

First, in the context in which it was used, the term "appropriate steps" is not ambiguous. It means proceeding through the steps required to license a waste disposal facility. The meaning of this Compact provision is informed by the Atomic Energy Act of 1954, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985, and fully set out in the United States Nuclear Regulatory Commission ("NRC") regulations. See 10 C.F.R. pt. 61.[10] The laws

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[9] Federal common-law contract principles govern the interpretation and enforcement of interstate compacts. *E.g.*, *Kansas* v. *Colorado*, 533 U.S. 1, 10-14 (2001) (relying on common-law contract rules); *Beebe* v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1288-90 (D.C. Cir. 1997) (interstate compact is federal law and its interpretation and application are governed by federal common law).

[10] Under the Act, compacting states must site and license facilities as set out in the NRC regulations for licensing the disposal of radioactive waste. *See* 42 U.S.C. § 2021d(b)(3); *id.* § 2021(d)(2); *see also* Art. 6(A)(2). The NRC regulations detail the steps necessary to license and construct a low-level radioac-

and regulations lay out appropriate steps towards licensure of a low-level radioactive waste facility.

"[W]hen parties contract with reference to an industry whose terms are defined by an active supervising agency . . . , it is to be assumed in the absence of evidence to the contrary, that they have that terminology in mind." *Commercial Ins. Co. of Newark, N.J.* v. *Gonzalez*, 512 F.2d 1307, 1310 (1st Cir. 1975); see also *Superior Bus. Assistance Corp.* v. *United States*, 461 F.2d 1036, 1039 (10th Cir. 1972) (same) (citing *Keck* v. *United States*, 172 U.S. 434 (1899)). And, in fact, the record demonstrates that North Carolina understood "appropriate steps" to mean exactly what NRC regulations require. Immediately following its designation as the next host State, North Carolina identified the steps it would take, including: (1) selection of a proposed site from which data would be collected and analyzed to determine if the site characteristics met the requirements of the regulations; (2) acquisition of land; (3) selection of an operator; (4) performance of any technical improvements to the site required by the regulator; (5) obtaining licenses for the facility and achieving standards for the operation of the facility as required by the regulator; (6) operation of the facility; (7) decommissioning of the site; and (8) perpetual care of the site. See Subcommittee Report on the Roles of the State and Private Sector in a Low-Level Radioactive Waste Disposal Facility (App. 516-18); see also North Carolina Licensing Work Plan, May 31, 1996 (App. 229-33) ("The objective of the Plan is to guide activities necessary to . . . make a . . . licensing decision.").

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tive waste facility. *See* 10 C.F.R. § 61.10; *id.* §§ 61.11-.16. These regulations give specific content to the phrase "appropriate steps."

However, in December 1997, North Carolina sent the Commission a letter notifying it of the State's intention to "commence the orderly shutdown of the project." Dec. 19, 1997 Corgan letter to Hodes (App. 319). As noted, it is undisputed that over the next 19 months, while still a member of the Compact and the designated host State, North Carolina failed to take *any* steps, let alone "appropriate steps," towards obtaining or issuing a license to operate a low-level radioactive waste disposal facility. See *supra* at 31. It simply repudiated the Compact and did so while insisting that it was the other party States who were in the wrong by not providing North Carolina with more money.

The Special Master noted that North Carolina engaged in certain minimal activities from December 1997 to July 1999, and appears to have considered these to be "appropriate steps." For example, the Special Master stated that North Carolina "continue[d] to fund the Authority for several years, maintain[ed] the project's records, and preserve[d] the work done to date." Second Report 18. But North Carolina funded the Authority after December 1997 only in order to oversee "the orderly shutdown of the project." Dec. 19, 1997 Corgan letter to Hodes (App. 319). These activities thus were not steps towards licensing and did not fulfill the State's obligations under Article 5(C).

The Second Report also incorrectly suggests that North Carolina somehow discharged its duty to take "appropriate steps" by seeking alternative funding after December 1997. See Second Report 28, 36. The record does not support this conclusion. There is no evidence that North Carolina made any funding proposal, no evidence that the North Carolina Authority sought any loans, no evidence of any requests for

appropriations from North Carolina's General Assembly, and no evidence that North Carolina sought federal funds. To the contrary, the record reveals only that North Carolina *rejected* a funding proposal made by the Commission. In light of this, the Second Report was more accurate when it stated, in another context, that after December 1997, all that North Carolina did was "*hope* that alternative funding could be secured." *Id.* at 27 (emphasis added). Hoping is not an appropriate step.

Finally, the Special Master asserted that the parties' course of performance should be used in interpreting the term "appropriate steps." *Id.* at 23-28. He noted that North Carolina had received funding to assist its licensing of a facility; from this, he divined that North Carolina was required to take steps towards licensing a facility only so long as the funding continued – *i.e.*, that it was appropriate for North Carolina to cease concrete steps towards licensing once the party States no longer provided a source of funding. He stated that "the obligation [to take 'appropriate steps' to secure a license] is properly construed to be more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost." *Id.* at 21. And, he found that, in light of the cessation of funding, it was appropriate for North Carolina simply "to fund the Authority and preserve the project until it withdrew." *Id.* at 28. This view suffers from numerous flaws and would deprive the "appropriate steps" requirement of all meaning.

First, although the parties' course of performance can assist in interpreting an ambiguous contract, it cannot be used to contradict the unambiguous terms of the agreement. 11 Williston & Lord, *supra*, § 31:4, at 274-78 ("While the court may also look to course of

performance . . . primary importance should be placed upon the words of the contract. . . . If the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and *from that language alone* . . . .") (emphasis added; footnotes omitted); see also *Cooper Distrib. Co.* v. *Amana Refrigeration, Inc.*, 63 F.3d 262, 279 (3rd Cir. 1995) (Alito, J.) ("While extrinsic evidence, such as the course of performance evidence . . . may be admissible to supplement or explain the terms of the agreement, it cannot be used to contradict unambiguous terms.") (alterations and quotation marks omitted).

The Compact is not ambiguous with respect to who bears the responsibility for funding a low-level radioactive waste facility. Significantly, it expressly states that the Commission is not "responsible for any costs associated with . . . the creation of any facility." Art. 4(K); see Preliminary Report 20 (citing Art. 4(K)) ("[T]he Compact was drafted on the apparent assumption that a State (such as North Carolina) designated as a host State would bear the costs of building its own disposal facility and would not receive funding from the Commission."); cf. N.C. Gen. Stat. § 104G-4 (repealed 2000) (App. 34) (the Authority is responsible to "site, finance, [and] build" a facility to receive the region's low-level radioactive waste for disposal.). In light of the Compact's clear allocation of funding responsibility, it was error for the Special Master to find that North Carolina's obligation to take appropriate steps towards licensing was conditioned upon the continued provision of funding.

Second, the Special Master concluded that North Carolina's sovereign status supported his view that the term "appropriate steps" should be interpreted by the parties' course of performance. Second Report 23

(citing Art. 3). He cited no authority in support of this proposition. Regardless of any sovereign status, however, course of performance is not applicable to unambiguous contract terms. Just as when the federal government waives its immunity and enters a contract, North Carolina is subject to the ordinary principles of contract law and interpretation; these rules do not change because a State is a contracting party. Cf. *Franconia Assocs.*, 536 U.S. at 141 ("Once the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity."). This is particularly true where, as here, *both* contracting parties are sovereigns and the contract at issue is a Compact. All party States made the same promise to each other – to fund the licensing of a low-level radioactive waste facility when it came their turn to be the host State. Finally, as explained *supra* at 35-36, even if resort to the parties' course of performance is permissible, it cannot be used to contradict the Compact's explicit provisions making clear that funding is exclusively the responsibility of the host State.

Third, the Special Master used the parties' course of performance to give the term "appropriate steps" a meaning that makes no sense in context. See *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006) ("[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"). The Compact's essential purpose is to provide for the cooperative establishment of low-level radioactive waste disposal facilities. To accomplish this, each host State was responsible for funding the licensure of a facility. The "appropriate steps" necessary to achieve this purpose are evident, and North Carolina cannot reasonably be said to have fulfilled its obligation to

take such steps merely by "preserv[ing] the project until it withdrew." Second Report 28. North Carolina had a duty to continue to fund the licensing process and take steps, *i.e.*, move forward towards licensing.

Ultimately, however, the parties' course of performance does not support the Special Master's decision that North Carolina took appropriate steps under the Compact. It was North Carolina – not the Commission – who bore the responsibility of funding the siting and licensing of the facility. It is undisputed that shortly after entering the Compact and becoming the host State, North Carolina enacted into law its clear understanding that it would fund the facility. N.C. Gen Stat. § 104G-4 (repealed 2000) (App. 34) (The Authority is "to site, *finance*, build, lease or operate, oversee, monitor and close [the regional] facility.") (emphasis added). To that end, the North Carolina Authority's Legal and Finance Committees immediately identified funding mechanisms, including state appropriations, revenue bonds, private loans, and federal public assistance bonds. See Dec. 7, 1987 and Jan. 11, 1988 Minutes of North Carolina Authority's Legal and Finance Committee Meeting (App. 519-20 & 523-24). And, North Carolina began appropriating funds.[11] See 1987 N.C.

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[11] The Compact parties' understanding was that each host State, in turn, would fund the siting, licensing, and construction of a facility upfront and later use the fees and surcharges levied on users of the completed facility to repay the state for those expenditures, and then fund other state initiatives. *See* Nov. 17, 1988 Report to the Joint Legislative Commission on Government Operations by the NC Authority (App. 528) ("It is the understanding of the [North Carolina] Authority that all money expended for the planning, developing, licensing, regulating, constructing, operating and closing this disposal facility *will be paid for by the operation of the facility and that all appropriated*

Sess. Laws ch. 1086 (appropriating funds for "Low Level Radioactive Waste Management Site Development") (App. 60).

Moreover, each time it requested funds from the Commission, North Carolina recognized that the Commission had no legal obligation to make those payments.[12] In fact, Governor Hunt told his constituents as much only six months before North Carolina stopped performing. May 19, 1997, Hunt letter to Rimmler (App. 275) ("The Compact law . . . does not provide a funding mechanism for the host state. Indeed, that law requires the state which is currently developing a site for use by the Compact members to bear the full burden of the cost."). On these undisputed facts, the parties' course of performance does not support the conclusion that the Commission was responsible for funding the facility or that North Carolina's obligation to take appropriate steps to provide a facility were conditioned on Commission funding. The record conclusively demonstrates just the opposite – that these were North Carolina's obligations.

The Special Master placed particular reliance on the February 1988 Commission resolution establishing the Host State Assistance Fund as a significant indication that costs were relevant in determining whether North Carolina took "appropriate steps."

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money from the General Assembly will be repaid from this revenue.") (emphasis added).

[12] *See* MacMillan, Executive Director of North Carolina Low-level Radioactive Waste Management Authority, Dep. Tr. at 40:13-:17 (App. 470) (Question (by Ms. Kochler): "Was it your understanding that [the Commission] w[as] obligated to make [funds requested by the Authority] available . . . ?" Answer (by Mr. MacMillan): "Well, I knew that at any time they could say no.").

Second Report 25. Passed two years after contract formation and stating that the fund is "necessary and appropriate" for the construction of the facility, the resolution cannot bear this weight. In fact, the resolution clearly states that the Commission is not obligated to provide financial assistance. Resolution, Feb. 9, 1988 ("[T]he Commission, although not obligated to do so under the Compact," provides this funding.) (App. 63). Furthermore, North Carolina specifically recognized at the time it requested this funding that the resolution's language did not alter the meaning of the Compact. See N.C. Gen Stat. § 104G-4 (repealed 2000) (App. 34).[13] Finally, over subsequent years, the Commission reiterated, and North Carolina agreed, that North Carolina – not the Commission or the party States – had a duty to fund the facility.

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[13] This resolution provided only an initial sum of $200,000 for assistance to any state designated as the next host State for planning, administrative, and other pre-operational costs, *i.e.*, a small fraction of the total cost of the facility that North Carolina voluntarily undertook to finance, license, and operate. *See* Dec. 7, 1987 Minutes of North Carolina Low-Level Radioactive Waste Management Authority's Legal and Finance Committee Meeting (App. 519) ("[T]he Southeast Compact Commission has budgeted $200,000 per year for utilization of the next host State to *partially off-set* pre-operational costs.") (emphasis added). It thus cannot be viewed as altering the parties' understanding of North Carolina's fundamental obligation to finance the project under the Compact. *See* Resolution, Feb. 9, 1988 (App. 63). To be sure, the 1998 resolution stated that certain funding was both "appropriate" and "necessary." However, this language applied to the small amount of "seed" money provided for by the actual resolution. None of the parties ever understood that this was a statement applying to all funding by the Commission over the entire eleven-year period. In fact, North Carolina continued to reiterate, long after this resolution, that it – and not the Commission – had the responsibility to fund the facility.

The Special Master read North Carolina's obligations out of the Compact, viewing the Compact as aspirational, rather than treating it as a federal statute and contract. He opined that "each of the participating States hoped to receive the benefit of being able to dispose of waste at a facility outside its borders, while avoiding the burdens of being the State selected to host the waste disposal facility." Second Report 13. He claimed, further, that the Compact was "designed to maximize the participating States' ability to extricate themselves from the arrangement if they had the misfortune of being chosen as the host State" and that "[u]nder such a regime, it would be surprising indeed if a facility were actually constructed without significant assistance from the States not selected as hosts or from the Commission, drawing on other sources of revenue." *Id.* at 14. This ineffectual reading of the Compact and the commitments it involved cannot be reconciled with the facts: The Compact is a federal statute, and Congress intended to address – not avoid – the problem of low-level radioactive waste disposal when it authorized and then enacted into law these regional waste disposal compacts. Once chosen as a host State, North Carolina was obligated by the Compact, at a minimum, to take "appropriate steps to ensure that [a] license to construct and operate a facility . . . [wa]s filed with and issued by the appropriate authority." Art. 5(C). This it did not do.

C. North Carolina Breached Its Implied Covenant Of Good Faith And Fair Dealing.

Independently, North Carolina breached the Compact when, after inducing the other party States to invest more than eleven years and almost $80 million in the development of a regional waste disposal facil-

ity, it ceased performing based on the Commission's denial of funding and then withdrew from the Compact on the eve of the sanctions hearing. In these circumstances, North Carolina's withdrawal breached its implied covenant of good faith and fair dealing.

"*Every contract* imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Restatement (Second) of Contracts* § 205 (emphasis added). The duty of good faith and fair dealing "is based on fundamental notions of fairness." 2 E. Allan Farnsworth, *Farnsworth on Contracts*, § 7.17, at 355-56 (3d ed. 2004) (citing U.C.C. § 1-304). It requires of each party "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Restatement (Second) of Contracts* § 205, cmt. *a*. While "[a] complete catalogue of types of bad faith is impossible," commonly recognized examples include "evasion of the spirit of the bargain," "lack of diligence," and "willful rendering of imperfect performance." *Id.* § 205, cmt. *d*. Failure to perform in good faith is a breach. 23 Williston & Lord, *supra*, § 63:21, at 497-98 ("the failure to perform a duty when performance is due is a breach, . . . as, for example, is the case where there is a breach of the duties of good faith and fair dealing").

To be sure, North Carolina could withdraw from the Compact; it simply could not do so in bad faith. North Carolina's withdrawal from the Compact, in this instance, was the epitome of bad faith and unfair dealing. As noted above, North Carolina sought and obtained almost $80 million to assist it in fulfilling its Compact obligations and, ultimately, to produce a waste disposal facility. While doing so, North Carolina repeatedly reaffirmed its commitment to complete a facility. See, *e.g.*, N.C. Governor's Press Re-

lease (Nov. 8, 1989) (App. 75), ("The task of siting and operating a low-level radioactive waste disposal facility is a commitment the State of North Carolina has made and one which I am personally committed to keeping."); Oct. 25, 1990, Gov. Martin letter to Campbell (App. 92), ("North Carolina remains *committed to fulfilling its obligations* to the Compact to serve as the next host state."); Apr. 4, 1991, Gov. Martin letter to Hodes (App. 102), ("North Carolina expresses its continued highest level of *commitment to the timely establishment of the . . . facility*") (emphases added).

But, when the party States ceased providing funding, North Carolina refused to perform, claiming that this cessation eliminated its duty to do so. North Carolina made this claim in the face of unambiguous Compact language stating that the Commission is not responsible for funding the host State's facility. Finally, with a sanctions complaint pending against it, North Carolina withdrew from the Compact seeking to escape accountability. This opportunistic conduct is inconsistent with the Compact and with the State's duty of good faith and fair dealing; it also undermines the stability of Compacts and the predictability of contractual relations. See, *e.g.*, *Mkt. Street Assocs. Ltd. P'ship* v. *Frey*, 941 F.2d 588, 595 (7th Cir. 1991 ("The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of a rule.").

The Special Master determined that the duty of good faith and fair dealing does not apply here. First, he cited considerations of federalism, stating that "judicial imposition of compact terms beyond those for which the States have expressly bargained poses risks similar to those inherent in interpreting am-

biguous federal statutes to impose obligations on States in areas . . . in which the States have exercised 'traditional and primary power.'" Second Report 30 (quoting *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001)).

But, this solicitude for North Carolina ignores that its contractual partners are also sovereigns. When States contract with fellow States, federal common-law contract principles apply. *Oklahoma* v. *New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part) (an interstate compact "remains a contract which is subject to normal rules of enforcement and construction"); see also *Beebe* v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1288-90 (D.C. Cir. 1997) (interstate compact is federal law whose interpretation is governed by federal common law). The implied duty of good faith is such a principle. In *Tymshare, Inc.* v. *Covell* 727 F.2d 1145, 1153 (D.C. Cir. 1984), then-Judge Scalia explained that the modern expression of "good faith" is a surrogate for the long-standing common-law principle that there are "implied obligation[s] or limitation[s]" in a contract. See *id.* at 1152 (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)). When sovereigns contract, each is entitled to the benefit of normal contract-law principles.

The Special Master also wrongly believed that if he were to read a duty of good faith into the Compact, that would limit North Carolina's express right to withdraw. Second Report 31. While the Compact states that "any party state may withdraw from this compact," Art. 7(G), it does not authorize a State to withdraw in bad faith or for any reason whatsoever, no matter how arbitrary or unreasonable and no matter whether the State's withdrawal would defeat substantial and justified reliance interests of the

other party States.[14] The Compact cannot reasonably be read to authorize this type of bad faith withdrawal.[15]

The structure of the Compact and the statements of the contracting parties provide the best evidence of the parties' understanding of their mutual commitments. Both confirm that the parties understood and intended each party State to undertake its respective responsibilities under the Compact in good faith. The *Tymshare* court concluded that the appropriate question is "whether it was reasonably understood by the

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[14] Many courts have recognized that an express right to terminate a contract must be exercised consistently with the duty of good faith and fair dealing, particularly where, as here, the contractual relations among the parties "involve a special element of reliance." *See, e.g.*, *Bohne* v. *Computer Assocs. Int'l, Inc.*, 445 F. Supp. 2d 177, 181 (D. Mass. 2006) (quotation marks omitted) (collecting cases), *rev'd on other grounds*, 541 F.3d 141 (1st Cir. 2008); *United Roasters, Inc.* v. *Colgate Palmolive Co.*, 649 F.2d 985, 989 (4th Cir. 1981) ("[w]hen termination is oppressive, when it would frustrate expectations reasonably held, though unsecured by express contractual agreements and when it will impose substantial losses upon the other party, application of the [good-faith] principle may well be called for"); *Randolph* v. *New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1386 (6th Cir. 1975) (duty of good faith applies to "the exercise of a facially unrestricted termination clause").

[15] The Special Master attempted to distinguish *Entergy Arkansas, Inc.* v. *Nebraska*, 358 F.3d 528, 547-48 (8th Cir. 2004), where the Eighth Circuit held that the duty of good faith applied to an interstate compact, by noting that there was an express provision in the Compact obligating the States to act in good faith. Second Report 31, n.3. However, in analyzing the issue, the Eighth Circuit looked to the *Restatement (Second) of Contracts* and cited this Court's reference to the *Restatement* in another interstate compact case, *Texas* v. *New Mexico*, 482 U.S. 124, 129 (1987). The *Restatement* similarly compels application of the good faith doctrine here. *See Restatement (Second) of Contracts* § 205.

parties to th[e] contract that there were at least certain purposes for which [an] expressly conferred power . . . could not be employed." 727 F.2d at 1153. North Carolina has admitted that it understood that the Compact required it to act in good faith. "The obligation conferred on North Carolina under the terms of the Compact was *to work in good faith* to construct a facility, unless and until North Carolina exercised its right to withdraw from the Compact and forgo the benefits of membership." Def. Reply to Mot. to Dismiss at 19 (emphasis added).[16] North Carolina's cessation of performance based on the Commission's refusal to provide further funds followed by withdrawal when sanctions were threatened constitutes bad faith as a matter of law.

Regardless of the Special Master's contrary view, the "duty of good faith" applies to "the exercise of a facially unrestricted termination clause," *Randolph* v. *New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1386 (6th Cir. 1975), unless the express language or the structure of the contract requires another reading. See *Tymshare*, 727 F.2d at 1154. Nothing in the

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[16] A contract *can* be written so "'as to leave decisions absolutely to the uncontrolled discretion of one of the parties.'" *Tymshare*, 727 F.2d at 1153. But "the trick is to tell *when* a contract has been so drawn – and surely the mere recitation of an express power is not always the test." *Id.* (emphasis in original). "[T]o say that every *expressly conferred contractual power* is of this nature is virtually to read the doctrine of good faith . . . out of existence." *Id.* at 1153-54 (emphasis added). If the express terms of the Compact were enough to allow the states unlimited discretion to withdraw, there would be no implied duty of good faith. *Id.* at 1153 ("[W]e must reject at the outset the proposition . . . that as to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct.") (internal quotation marks and alteration omitted).

text or structure of the Compact suggests that the party States have been relieved of their obligation to act in good faith.

Indeed, reading the Compact to allow bad faith withdrawals would render the contract illusory. On this reading, party States can reap the benefits of Compact membership and yet withdraw at any time after being designated the host State and do so in bad faith. This Court should not read the Compact cynically as the Special Master did – to render it self-defeating. *E.g.*, *Restatement (Second) of Contracts* § 76, cmt. *d* ("Words of promise do not constitute a promise if they make performance entirely optional with the purported promisor. Such words, often referred to as forming an illusory promise, do not constitute consideration for a return promise.") (citation omitted). Instead, the Court should enforce the contracting parties' duty of good faith and fair dealing and find that bad faith withdrawals constitute a Compact breach. See, *e.g.*, 1 Farnsworth, *supra*, § 2.13, at 137 (courts "salvage[ ] [an otherwise illusory contract] by requiring that one of the parties perform in good faith").[17]

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[17] Even if the Compact were illusory, the Plaintiff States would be entitled to restitution of the benefit they conferred on North Carolina in the mistaken belief that the parties had entered into a legally binding contract. *See Restatement (Third) of Restitution & Unjust Enrichment* § 5(2) (T.D. No. 1, 2001) ("[t]he mistake that will serve as the basis for rescission and restitution . . . is a misapprehension of fact or law on the part of the transferor, where (a) but for the mistake the transfer would not have taken place; and (b) the transferor does not bear the risk of the mistake"); *id.* § 31, cmt. *a* (T.D. No. 3, 2004) ("[I]f a purported agreement proves after performance to be unenforceable because of a defect in contract formation – with the result that the claimant has performed in the mistaken belief that a contract exists when in fact it does not – the resulting restitu-

D. North Carolina Repudiated The Contract.

North Carolina also repudiated the contract. A repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Restatement (Second) of Contracts* § 250(a), see also *Mobil Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 608 (2000) (same); 9 Arthur Linton Corbin, *Corbin on Contracts*, § 959, at 759 (Interim ed. 2002) (repudiation occurs when "the promisor makes a definite statement to the promisee that he either will not or can not perform his contract"); see also *id.*, § 972, at 798.

North Carolina repudiated the Compact when it flatly informed the Commission and the member States that it would "commence the orderly shutdown of the project" and thereafter ceased performing. Dec. 19, 1997, Corgan letter to Hodes (App. 319). The Special Master failed to mention or analyze North Carolina's repudiating statements.[18]

By its terms, the Compact requires North Carolina to "take appropriate steps to ensure that an applica-

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tion claim is generally regarded as one for benefits conferred by mistake.").

[18] The Special Master appeared to misunderstand Plaintiffs' repudiation argument, describing it as follows: because "North Carolina took the position that it could not complete the licensing process on its own and decreased its expenditures from approximately $2 million a year to approximately $440,000 a year . . . North Carolina repudiated its obligations under the Compact." Second Report 27. That is not Plaintiffs' argument. Instead, Plaintiffs argue that North Carolina repudiated the contract on December 19, 1997, when it informed Plaintiffs that it would commence the orderly shutdown of the project and take no steps to license a facility as required by the Compact.

tion for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Art. 5(C). However, in a letter dated December 19, 1997, addressed to Chairman Hodes of the Commission and copied to the "Southeast Compact Member State Governors," Chairman Corgan of the North Carolina Authority stated that the cessation of funding from the Commission had "made further performance by the Authority impossible" and left the Authority with "no alternative but to commence the orderly shutdown of the project." Dec. 19, 1997 Letter (App. 317, 319). On the same day, the Authority passed resolutions directing the Authority's contractors and staff "to begin an orderly cessation of facility development activities." Dec. 19, 1997 Minutes of North Carolina Authority Meeting (App. 322).

These statements constitute "a refusal to render any further performance whatever under the contract," 9 Corbin *supra*, § 972, at 798, and, therefore, constitute a classic repudiation. The repudiation is underlined by North Carolina's *admission* that it took no steps to license or site a facility after December 19, 1997. See Second Report 10; see also Undisputed Facts ¶ 55; Def. Statement of Material Facts Not in Dispute ¶¶ 67-70.[19]

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[19] The Special Master also believed that North Carolina did not repudiate the contract because it did not "act in a way that rendered it unable to perform under the Compact." Second Report 27. North Carolina's *ability* to perform does not preclude a finding of repudiation. Repudiation occurs one of two ways: when a party "cannot" perform or "will not" perform "at least some of its obligations under the contract." 2 Farnsworth, *supra* § 8.21, at 558. North Carolina, while able to perform, refused to do so. That is a repudiation.

The Special Master seemed to believe that North Carolina did not repudiate its obligations because it stated it was willing to perform if the Commission provided further funding. Second Report 27 ("North Carolina did not state that it intended to breach the Compact. To the contrary, North Carolina took the position that it was not obligated under the Compact to bear all of the costs associated with licensing a facility."); see also Def. North Carolina's Opp'n to Pls.' Mot. for Summ. J. at 15 ("Had the Commission provided further funding to North Carolina, the Authority would have resumed the licensing process.").

This conditional willingness to perform only if other parties to the Compact forgo their rights under the agreement does not alter North Carolina's repudiation. "[L]anguage that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation." *Restatement (Second) of Contracts* § 250, cmt. *b* (quoting U.C.C. § 2-610, off. cmt. 2); *accord* 2 Farnsworth, *supra*, § 8.21, at 562.

Under the express terms of the Compact, the Commission "is not responsible for any costs associated with . . . the creation of any facility." Art. 4(K). The obligation to fund the facility was North Carolina's, which it recognized. N.C. Gen. Stat. § 104G-4 (repealed 2000) (App. 34) (the Authority is responsible to "site, finance, [and] build" a facility to receive the region's low-level radioactive waste for disposal.). North Carolina's refusal to fulfill its obligations as host State absent funding clearly "amount[ed] to a statement of intention not to perform except on conditions which go beyond the contract" and therefore "constitut[ed] a repudiation." *Restatement (Second) of Contracts* § 250 cmt. *b* (internal quotation omitted).

Finally, North Carolina cannot avoid repudiation by pointing to its efforts to "fund the authority for several years, maintain the project's records, and preserve the work done to date," Second Report 18, in the "hope" that alternative funding could be secured. This conduct is simply another aspect of North Carolina's conditional refusal to perform, seeking to extract from its contract partners funds that they were not contractually required to provide.

North Carolina repudiated its Compact obligations when it made a definite statement that it would not take steps to site and license a facility, and made good that threat.

III. THE PLAINTIFFS ARE ENTITLED TO RESTITUTION.

North Carolina's breach of the Compact entitles the party States to standard contractual remedies, including restitution. 9 Corbin, *supra*, § 946, at 717 ("For every breach of contract, irrespective of its size or kind, the law will give an immediate remedy.").[20] When a breach of contract occurs, the non-breaching party is entitled to restitution of any benefit he conferred on the breaching party, and that is the relief Plaintiffs seek. *E.g.*, *Restatement (Second) of Contracts* § 344, cmt. *d* (Restitution is the appropriate contract remedy where, "instead of seeking to enforce an agreement, [the injured party] claims relief on the

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[20] In the alternative, the States are entitled to damages. *Restatement (Second) of Contracts* § 236, cmt. *a* ("Every breach gives rise to a claim for damages, and may give rise to other remedies."). *Id.* § 347, cmt. *a* ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.").

ground that the other party has been unjustly enriched as a result of some benefit conferred under the agreement.").

The principles governing restitution as a remedy for breach of contract are set forth in § 373 of the *Restatement (Second) of Contracts*. See *Mobil Oil*, 530 U.S. at 608 (relying on § 373 for the "relevant principles"). Subject to an exception not applicable here, § 373 provides:

> [O]n a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

Under § 373, the party States are entitled to restitution because (1) North Carolina committed a breach by non-performance that gave rise to a claim for damages for total breach and a repudiation; (2) North Carolina received a benefit; (3) the benefit was conferred by the party States; and (4) the benefit was conferred by way of part performance "or reliance." See *supra* at II.B.

Critically, the Commission, acting on behalf of the party States, did not provide funds in *performance* of the Compact – neither the States nor the Commission had a duty under the Compact to provide North Carolina with funding. But the funds were provided in *reliance* on the Compact and on North Carolina's representations thereunder. Put another way, the Commission, on behalf of the Party States, would not have provided funds absent North Carolina's obligation and commitment to the other States to develop and operate a regional facility as required by the Compact. Plaintiffs were fully justified in that reli-

ance because North Carolina repeatedly affirmed that it would develop and operate a regional facility and otherwise fulfill its obligations under the Compact. See *supra*, at 8, 42-43. An injured party is entitled to restitution of benefits conferred in justifiable reliance on an agreement. *Restatement (Second) of Contracts* § 370, cmt. *a* (restitution is appropriate "if the party seeking restitution relies on the contract in some [way other than by performance]").

Accordingly, the Plaintiffs are entitled to restitution of $80 million, plus interest. See, *e.g.*, 12 Corbin, *supra*, § 1108, at 29 ("If the plaintiff has made money payments to the defendant and there is later a failure of consideration therefore, involving a repudiation by the defendant or any other breach going to the essence of the contract, the plaintiff can maintain an action for restitution of the money so paid to the defendant, with interest.").

CONCLUSION

For the foregoing reasons, this Court should adopt Plaintiffs' exceptions and order the enforcement of the sanctions order or, in the alternative, order North Carolina to pay full restitution.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
ANGELA M. XENAKIS
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

BILL MCCOLLUM
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
STATE OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

ROBERT E. COOPER JR.
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

WILLIAM C. MIMS
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
(804) 786-2071

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, NC 27605
(919) 828-2501

Counsel for Plaintiffs

June 24, 2009

* Counsel of Record

APPENDIX A

OMNIBUS LOW-LEVEL RADIOACTIVE WASTE INTERSTATE COMPACT CONSENT ACT, Pub. L. No. 99-240, tit. II, 99 Stat. 1859 (1986)

TITLE II – OMNIBUS LOW-LEVEL RADIOACTIVE WASTE INTERSTATE COMPACT CONSENT ACT

SEC. 201. SHORT TITLE.

This Title may be cited as the "Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act".

Subtitle A – General Provisions

SEC. 211. CONGRESSIONAL FINDING.

The Congress hereby finds that each of the compacts set forth in subtitle B is in furtherance of the Low-Level Radioactive Waste Policy Act.

SEC. 212. CONDITIONS OF CONSENT TO COMPACTS.

The consent of the Congress to each of the compacts set forth in subtitle B –

(1) shall become effective on the date of the enactment of this Act;

(2) is granted subject to the provisions of the Low-Level Radioactive Waste Policy Act, as amended; and

(3) is granted only for so long as the regional commission, committee, or board established in the compact complies with all of the provisions of such Act.

SEC. 213. CONGRESSIONAL REVIEW.

The Congress may alter, amend, or repeal this Act with respect to any compact set forth in subtitle B

after the expiration of the 10-year period following the date of the enactment of this Act, and at such intervals thereafter as may be provided in such compact.

APPENDIX B

SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT, Pub. L. No. 99-240, tit. II, § 223, 99 Stat. 1871 (1986)

SEC. 223. SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT.

In accordance with section 4(a)(2) of the Low-Level Radioactive Waste Policy Act (42 U.S.C. 2021d(a)(2)), the consent of the Congress is hereby given to the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia to enter into the Southeast Interstate Low-Level Radioactive Waste Management Compact. Such compact is substantially as follows:

"SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT

"ARTICLE 1

"POLICY AND PURPOSE

"There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Compact. The party States recognize and declare that each state is responsible for providing for the availability of capacity either within or outside the State for disposal of low-level radioactive waste generated within its borders, except for waste generated as a result of defense activities of the federal government or federal research and development activities. They also recognize that the management of low-level radioactive waste is handled most efficiently on a regional basis.

The party states further recognize that the Congress of the United States, by enacting the Low-Level Radioactive Waste Policy Act (Public Law 96-573), has provided for an encouraged the development of low-level radioactive waste compacts as a tool for disposal of such waste. The party states recognize that the safe and efficient management of low-level radioactive waste generated within the region requires that sufficient capacity to dispose of such waste be properly provided.

"It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort; provide sufficient facilities for the proper management of low-level radioactive waste generated in the region; promote the health and safety of the region; limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region; encourage the reduction of the amounts of low-level waste generated in the region; distribute the costs, benefits, and obligations of successful low-level radioactive waste management equitably among the party states; and ensure the ecological and economical management of low-level radioactive wastes.

"Implicit in the Congressional consent to this compact is the expectation by Congress and the party states that the appropriate federal agencies will actively assist the Compact Commission and the individual party states to this compact by:

> "1. expeditious enforcement of federal rules, regulations, and laws;
>
> "2. imposing sanctions against those found to be in violation of federal rules, regulations, and laws;

"3. timely inspection of their licensees to determine their capability to adhere to such rules, regulations, and laws;

"4. timely provision of technical assistance to this compact in carrying out their obligations under the Low-Level Radioactive Waste Policy Act, as amended.

"ARTICLE 2

"DEFINITIONS

"As used in this compact, unless the context clearly requires a different construction:

"1. 'Commission' or 'Compact Commission' means the Southeast Interstate Low-Level Radioactive Waste Management Commission.

"2. 'Facility' means a parcel of land, together with the structure, equipment, and improvements thereon or appurtenant thereto, which is used or is being developed for the treatment, storage, or disposal of low-level radioactive waste.

"3. 'Generator' means any person who produces or processes low-level radioactive waste in the course of, or as an incident to, manufacturing, power generation, processing, medical diagnosis and treatment, research, or other industrial or commercial activity. This does not include persons who provide a service to generators by arranging for the collection, transportation, storage, or disposal of wastes with respect to such waste generated outside the region.

"4. 'High-level waste' means irradiated reactor fuel, liquid wastes from reprocessing irradiated reactor fuel, and solids into which such liquid wastes have been converted, and other high-level radioactive

waste as defined by the U.S. Nuclear Regulatory Commission.

"5. 'Host state' means any state in which a regional facility is situated or is being developed.

"6. 'Low-level radioactive waste' or 'waste' means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or by-product material as defined in Section 11e, (2) of the Atomic Energy Act of 1954 or as may be further defined by Federal law or regulation.

"7. 'Party state' means any state which is a signatory party to this compact.

"8. 'Person' means any individual, corporation, business enterprise, or other legal entity (either public or private).

"9. 'Region' means the collective party states.

"10. 'Regional facility' means (1) a facility as defined in this article which has been designated, authorized, accepted, or approved by the Commission to receive waste or (2) the disposal facility in Barnwell County, South Carolina, owned by the State of South Carolina and as licensed for the burial of low-level radioactive waste on July 1, 1982, but in no event shall this disposal facility serve as a regional facility beyond December 31, 1982.

"11. 'State' means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any other territorial possession of the United States.

"12. 'Transuranic wastes' means waste material containing transuranic elements with contamination levels as determined by the regulations of (1) the U.S. Nuclear Regulatory Commission or (2) any host state,

if it is an agreement state under Section 274 of the Atomic Energy Act of 1954.

"13. 'Waste management' means the storage, treatment, or disposal of waste.

"ARTICLE 3

"RIGHTS AND OBLIGATIONS

"The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit, or abridge those rights.

"(A) Subject to any license issued by the U.S. Nuclear Regulatory Commission or a host state, each party state shall have the right to have all wastes generated within its borders stored, treated, or disposed of, as applicable, at regional facilities and, additionally, shall have the right of access to facilities made available to the region through agreements entered into by the Commission pursuant to article 4(e)(9). The right of access by a generator within a party state to any regional facility is limited by its adherence to applicable state and federal law and regulation.

"(B) If no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host state or states and approved by a two-thirds vote of the Commission.

"(C) Each party state must establish the capability to regulate, license, and ensure the maintenance and extended care of any facility within its borders. Host states are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities in accordance with the provisions of Article 5, Section (b).

"(D) Each party state must establish the capability to enforce any applicable federal or state laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders.

"(E) Each party state must provide to the Commission on an annual basis any data and information necessary to the implementation of the Commission's responsibilities. Each party state shall establish the capability to obtain any data and information necessary to meet its obligation.

"(F) Each party state must, to the extent authorized by federal law, require generators within its borders to use the best available waste management technologies and practices to minimize the volumes of waste requiring disposal.

"ARTICLE 4

"THE COMMISSION

"(A) There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Commission ('Commission' or 'Compact Commission'). The Commission shall consist of two voting members from each party state to be appointed according to the laws of each state. The appointing authorities of each state must notify the Commission in writing of the identity of its members and any alternates. An alter-

nate may act on behalf of the member only in the member's absence.

"(B) Each commission member is entitled to one vote. No action of the Commission shall be binding unless a majority of the total membership cast their vote in the affirmative, or unless a greater than majority vote is specifically required by any other provision of this compact.

"(C) The Commission must elect from among its members a presiding officer. The Commission shall adopt and publish, in convenient form, bylaws which are consistent with this compact.

"(D) The Commission must meet at least once a year and also meet upon the call of the presiding officer, by petition of a majority of the party states, or upon the call of a host state. All meetings of the Commission must be open to the public.

"(E) The Commission has the following duties and powers:

"1. To receive and approve the application of a non-party state to become an eligible state in accordance with the provisions of Article 7(b).

"2. To receive and approve the application of a non-party state to become an eligible state in accordance with the provisions of Article 7(c).

"3. To submit an annual report and other communications to the Governors and to the presiding officer of each body of the legislature of the party states regarding the activities of the Commission.

"4. To develop and use procedures for determining, consistent with consideration for public health and safety, the type and number of regional facilities which are presently necessary and which are pro-

jected to be necessary to manage waste generated within the region.

"5. To provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities.

"6. To develop and adopt, within one year after the Commission is constituted as provided in Article 7(d) procedures and criteria for identifying a party state as a host state for a regional facility as determined pursuant to the requirements of this article. In accordance with these procedures and criteria, the Commission shall identify a host state for the development of a second regional disposal facility within three years after the Commission is constituted as provided for in Article 7(d) and shall seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991.

"In developing criteria, the Commission must consider the following; the health, safety, and welfare of the citizens of the party states; the existence of regional facilities within each party state; the minimization of waste transportation; the volumes and types of wastes generated within each party state; and the environmental, economic, and ecological impacts on the air, land, and water resources of the party states.

"The Commission shall conduct such hearings, require such reports, studies, evidence, and testimony, and do what is required by its approved procedures in order to identify a party state as a host state for a needed facility.

"7. In accordance with the procedures and criteria developed pursuant to Section (e)(6) of this Article, to designate, by a two-thirds vote, a host state for the establishment of a needed regional facility. The

Commission shall not exercise this authority unless the party states have failed to voluntarily pursue the development of such facility. The Commission shall have the authority to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility.

"8. To require of and obtain from party states, eligible states seeking to become party states, and non-party states seeking to become eligible states, data and information necessary to the implementation of Commission responsibilities.

"9. Notwithstanding any other provision of this compact, to enter into agreements with any person, state, or similar regional body or group of states for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. The authorization to import requires a two-thirds majority vote of the Commission, including an affirmative vote of both representatives of a host state in which any affected regional facility is located. This shall be done only after an assessment of the affected facility's capability to handle such wastes.

"10. To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes. The authority to act, intervene, or otherwise appear shall be exercised by the Commission, only after approval by a majority vote of the Commission.

"11. To revoke the membership of a party state in accordance with Article 7(f).

"F. The Commission may establish any advisory committees as it deems necessary for the purpose of advising the Commission on any matters pertaining to the management of low-level radioactive waste.

"G. The Commission may appoint or contract for and compensate such limited staff necessary to carry out its duties and functions. The staff shall serve at the Commission's pleasure irrespective of the civil service, personnel, or other merit laws of any of the party states or the federal government and shall be compensated from funds of the Commission. In selecting any staff, the Commission shall assure that the staff has adequate experience and formal training to carry out such functions as may be assigned to it by the Commission. If the Commission has a headquarters it shall be in a party state.

"H. Funding for the Commission must be provided as follows:

"1. Each eligible state, upon becoming a party state, shall pay twenty-five thousand dollars to the Commission which shall be used for costs of the Commission's services.

"2. Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which:

"a. must be sufficient to cover the annual budget of the Commission;

"b. must represent the financial commitments of all party states to the Commission;

"c. must be paid to the Commission:

Provided, however, That each host state collecting such fees or surcharges may retain a portion of the collection sufficient to cover its administrative costs of collection and that the remainder be sufficient only to cover the approved annual budgets of the Commission.

"3. The Commission must set and approve its first annual budget as soon as practicable after its initial meeting. Host states for disposal facilities must begin imposition of the special fees and surcharges provided for in this section as soon as practicable after becoming party states and must remit to the Commission funds resulting from collection of such special fees and surcharges within sixty days of their receipt.

"I. The Commission must keep accurate accounts of all receipts and disbursements. An independent certified public accountant shall annually audit all receipts and disbursements of Commission funds and submit an audit report to the Commission. The audit report shall be made a part of the annual report of the Commission required by Article 4(e)(3).

"J. The Commission may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state, or the United States, or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm, or corporation, and may receive, utilize, and dispose of the same. The nature, amount, and condition, if any, attendant upon any donation or grant accepted pursuant to this section, together with the identity of the donor, grantor, or lender shall be detailed in the annual report to the Commission.

"K. The Commission is not responsible for any costs associated with:

"(1) the creation of any facility,

"(2) the operation of any facility,

"(3) the stabilization and closure of any facility,

"(4) the post-closure observation and maintenance of any facility, or

"(5) the extended institutional control, after post-closure observation and maintenance of any facility.

"L. As of January 1, 1986, the management of wastes at regional facilities is restricted to wastes generated within the region, and to wastes generated within nonparty states when authorized by the Commission pursuant to the provisions of this compact. After January 1, 1986, the Commission may prohibit the exploration of waste from the region for the purposes of management.

"M. 1. The Commission herein established is a legal entity separate and distinct from the party states capable of acting in its own behalf and is liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states. Members of the Commission shall not personally be liable for action taken by them in their official capacity.

"2. Except as specifically provided in this compact, nothing in this compact shall be construed to alter the incidence of liability of any kind for any act, omission, course of conduct, or on account of any causal or other relationships. Generators and transporters of wastes and owners and operators of sites shall be liable for their acts, omissions, conduct, or relationships in accordance with all laws relating thereto.

"ARTICLE 5

"DEVELOPMENT AND OPERATION OF FACILITIES

"A. Any party state which becomes a host state in which a regional facility is operated shall not be designated by the Compact Commission as a host state for an additional regional facility until each party state has fulfilled its obligation, as determined by the Commission, to have a regional facility operated within its borders.

"B. A host state desiring to close a regional facility located within its borders may do so only after notifying the Commission in writing of its intention to do so and the reasons therefore. Such notification shall be given to the Commission at least four years prior to the intended date of closure. Notwithstanding the four-year notice requirement herein provided, a host state is not prevented from closing its facility or establishing conditions of its use and operations as necessary for the protection of the health and safety of its citizens. A host state may terminate or limit access to its regional facility if it determines that Congress has materially altered the conditions of this compact.

"C. Each party state designated as a host state for a regional facility shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority.

"D. No party state shall have any form of arbitrary prohibition on the treatment, storage, or disposal of low-level radioactive waste within its borders.

"ARTICLE 6

"OTHER LAWS AND REGULATIONS

"A. Nothing in this compact shall be construed to:

"(1) Abrogate or limit the applicability of any act of Congress or diminish or otherwise impair the jurisdiction of any federal agency expressly conferred thereon by the Congress.

"(2) Abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an agreement state under Section 274 of the Atomic Energy Act of 1954 in which a regional facility is located.

"(3) Make inapplicable to any person or circumstance any other law of a party state which is not inconsistent with this compact.

"(4) Make unlawful the continued development and operation of any facility already licensed for development or operation on the date this compact becomes effective, except that any such facility shall comply with Article 3, Article 4, and Article 5 and shall be subject to any action lawfully taken pursuant thereto.

"(5) Prohibit any storage or treatment of waste by the generator on its own premises.

"(6) Affect any judicial or administrative proceeding pending on the effective date of this compact.

"(7) Alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions.

"(8) Affect the generation, treatment, storage, or disposal of waste generated by the atomic energy defense activities of the Secretary of the

United States Department of Energy or federal research and development activities as defined in Public Law 96-573.

"(9) Affect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders or to affect the rights and powers of any party state and its political subdivisions to tax or impose fees on the waste managed at any facility within its borders.

"B. No party shall pass any law or adopt any regulation which is inconsistent with this compact. To do so may jeopardize the membership status of the party state.

"C. Upon formation of the compact no law or regulation of a party state or of any subdivision or instrumentality thereof may be applied so as to restrict or make more inconvenient access to any regional facility by the generators of another party state than for the generators of the state where the facility is situated.

"D. Restrictions of waste management of regional facilities pursuant to Article 4 shall be enforceable as a matter of state law.

"ARTICLE 7

"ELIGIBLE PARTIES; WITHDRAWAL; REVOCATION; ENTRY INTO FORCE; TERMINATION

"A. This compact shall have as initially eligible parties the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

"B. Any state not expressly declared eligible to become a party state to this compact in Section (A) of this Article may petition the Commission, once constituted, to be declared eligible. The Commission may establish such conditions as it deems necessary and appropriate to be met by a state wishing to become eligible to become a party state to this compact pursuant to such provisions of this section. Upon satisfactorily meeting the conditions and upon the affirmative vote of two-thirds of the Commission, including the affirmative vote of both representatives of a host state in which any affected regional facility is located, the petitioning state shall be eligible to become a party state to this compact and may become a party state in the manner as those states declared eligible in Section (a) of this Article.

"C. Each state eligible to become a party state to this compact shall be declared a party state upon enactment of this compact into law by the state and upon payment of the fees required by Article 4(H)(1). The Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

"D. 1. The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article 4(H)(1) shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission; shall cause legislation to be introduced in Congress which grants the consent of Congress to this compact; and shall do those things necessary to organize the commission and implement the provisions of this compact.

"2. All succeeding states eligible to become party states to this compact shall be declared party states pursuant to the provisions of Section (C) of this Article.

"3. The consent of Congress shall be required for the full implementation of this compact. The provisions of Article 5 Section (D) shall not become effective until the effective date of the import ban authorized by Article 4, Section (L) as approved by Congress. Congress may by law withdraw its consent only every five years.

"E. No state which holds membership in any other regional compact for the management of low-level radioactive waste may be considered by the Compact Commission for eligible state status or party state status.

"F. Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state. Any sanction shall be imposed only upon the affirmative vote of at least two-thirds of the Commission members. Revocation of party state status may take effect on the date of the meeting at which the Commission approved the resolution imposing such sanction, but in no event shall revocation take effect later than ninety days from the date of such meeting. Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

"The Commission must, as soon as practicable after the meeting at which a resolution revoking status as

a party state is approved, provide written notice of the action, along with a copy of the resolution, to the Governors, the Presidents of the Senates, and the Speakers of the House of Representatives of the party states, as well as chairmen of the appropriate committees of Congress.

"G. Any party state may withdraw from the compact by enacting a law repealing the compact; provided, that if a regional facility is located within such a state, such regional facility shall remain available to the region for four years after the date the Commission receives notification in writing from the governor of such party state of the rescission of the compact. The Commission, upon receipt of the notification, shall as soon as practicable provide copies of such notification to the Governors, the Presidents of the Senates, and the Speakers of the House of Representatives of the party states as well as the chairmen of the appropriate committees of Congress.

"H. This compact may be terminated only by the affirmative action of Congress or by the rescission of all laws enacting the compact in each party state.

"ARTICLE 8

"PENALTIES

"A. Each party state, consistently with its own law, shall prescribe and enforce penalties against any person not an official of another state for violation of any provisions of this compact.

"B. Each party state acknowledges that the receipt by a host state of waste packaged or transported in violation of applicable laws and regulations can result in the imposition of sanctions by the host state which may include suspension or revocation of the violator's right of access to the facility in the host state.

"ARTICLE 9

"SEVERABILITY AND CONSTRUCTION

"The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared by a court of competent jurisdiction to be contrary to the Constitution of any participating state or of the United States, or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any other government, agency, person, or circumstance shall not be affected thereby. If any provision of this compact shall be held contrary to the Constitution of any State participating therein, the compact shall remain in full force and effect as to the state affected as to all severable matters. The provisions of this compact shall be liberally construed to give effect to the purposes thereof.".

No. 132, Original

In the Supreme Court of the United States

STATE OF ALABAMA, ET AL., PLAINTIFFS

v.

STATE OF NORTH CAROLINA

ON EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
CHARLES FINDLAY
BARCLAY T. SAMFORD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether sovereign immunity principles require the dismissal of the Southeast Low-Level Radioactive Waste Management Commission (Commission) as a plaintiff in this original action brought jointly by the Commission and four States against the State of North Carolina.

2. Whether the Southeast Low-Level Radioactive Waste Management Compact (Compact) authorizes the Commission to impose monetary sanctions against North Carolina in response to North Carolina's alleged breach of its obligations under the Compact.

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ON EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This is an original action filed by four States and an interstate compact commission which seeks a remedy for the State of North Carolina's alleged breach of the Southeast Interstate Low-Level Radioactive Waste Management Compact (Southeast Compact or Compact).[1] Interstate compacts require congressional consent, see U.S. Const. Art. I, § 10, Cl. 3, and Congress enacted legislation approving the Southeast Compact, see Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act (Consent Act), Pub. L. No. 99-240, Tit. II, § 223, 99 Stat. 1871. At the

[1] The original version of the Southeast Compact is reproduced at 99 Stat. 1871-1880, but the Compact was amended with the consent of Congress in 1989. See Pub. L. No. 101-171, § 2, 103 Stat. 1289. For the Court's convenience, this brief cites the amended Compact as reproduced in the appendix to North Carolina's exceptions brief (N.C. App.).

Court's invitation, the United States filed two briefs during earlier stages of this litigation. The United States participated in proceedings before the Special Master with respect to the motions addressed in the Master's Preliminary Report.

In this brief, the United States expresses its views primarily about the issues addressed in the Preliminary Report, which concern principles governing original actions, the Compact's structure, and the Commission's powers. The United States did not participate before the Special Master on the more fact-intensive issues concerning whether North Carolina violated the Compact, and it does not address those issues here.

STATEMENT

1. In 1986, Congress enacted legislation consenting to a number of regional compacts addressing the disposal of low-level radioactive waste. Consent Act §§ 221-227, 99 Stat. 1860-1924. The Southeast Compact is one of those compacts. It was originally an agreement among eight States. Compact Art. 7(A), N.C. App. 22a.

The Compact established the Southeast Interstate Low-Level Radioactive Waste Management Commission (Southeast Commission or Commission), comprised of two representatives of each member State. Compact Art. 4(A), N.C. App. 8a. The Compact confers upon the Commission various "duties and powers," including the authority to designate "a host state for the establishment of a needed regional" waste-disposal facility. Art. 4(E) and (E)(7), N.C. App. 9a, 11a-12a. The Compact identifies various "rights and obligations" of Compact membership, including the ability of each member's in-state generators to use any regional disposal facilities and an obligation to serve as a host State if designated. Art. 3(A) and (C), N.C. App. 6a-7a.

Article 5(C) of the Compact provides that a host State "shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." N.C. App. 18a-19a. Subject to certain restrictions not at issue here, the Compact also provides that "any party state may withdraw from the compact by enacting a law repealing the compact." Art. 7(G), N.C. App. 25a.

Article 7(F) addresses situations in which a "party state * * * fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state." N.C. App. 24a. It provides that such a State "may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state." *Ibid.*

2. This case arises from the Southeast Commission's decision to sanction North Carolina for its alleged failure to comply with its obligations under the Compact. In 1986, the Commission designated North Carolina as the host State for a new regional waste-disposal facility to replace a pre-existing facility in South Carolina. Prelim. Rep. 2. Although the Compact provides that the Commission "is not responsible for any costs associated with * * * the creation of any facility," Art. 4(K)(1), N.C. App. 16a, "the Commission provided North Carolina with close to $80 million in assistance" between 1988 and 1997. Prelim. Rep. 2. On December 1, 1997, "the Commission * * * informed North Carolina that it would no longer provide funding for the project." Second Rep. 17. In response, North Carolina ceased efforts to obtain the necessary licenses. *Id.* at 10.

In June 1999, the Florida and Tennessee representatives filed a complaint against North Carolina with the Commission. Mot. for Leave to File Bill of Complaint App. 127a–131a (Mot. App.). In July 1999, North Carolina with-

drew from the Southeast Compact. Prelim. Rep. 8. In December 1999, the Commission held a hearing and concluded that North Carolina had "failed to fulfill the obligations incurred by becoming a party state to this Compact." Mot. App. 137a; Second Rep. 8. The Commission ordered North Carolina to "pay to the Commission the sum of $79,930,887, the amount of funds provided by the Commission to North Carolina," as well as interest, attorneys' fees, and $10 million for revenue the Commission would have received had North Carolina completed a facility. Mot. App. 137a. North Carolina did not participate in the hearing and did not comply with the Commission's order. Second Rep. 8.

3. In 2000, the Commission moved for leave to file a bill of complaint against North Carolina. North Carolina opposed that motion, arguing that the Commission could not invoke this Court's original jurisdiction. Br. in Opp. at 11-12, *Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n* v. *North Carolina*, 531 U.S. 942 (2000) (No. 131, Original) (*Original 131*). At this Court's invitation, 531 U.S. 942 (2000), the United States filed a brief urging denial of the Commission's motion because the proposed suit did not fall within this Court's exclusive original jurisdiction over "controversies between two or more States." 28 U.S.C. 1251(a); see U.S. Amicus Br. at 7-19, *Original 131*. The Court denied leave to file a bill of complaint. *Original 131*, 533 U.S. 926 (2001).

In 2002, the Commission and four of the compacting States (plaintiff States) filed a new motion for leave to file a bill of complaint. North Carolina opposed that motion as well, arguing that the addition of the plaintiff States as "nominal" parties did not bring the case within this Court's exclusive original jurisdiction and that the nature of the controversy did not warrant an exercise of original jurisdiction. Br. in Opp. 18-25. Again at this Court's invitation, 537

U.S. 806 (2002), the United States filed a brief, urging the Court to grant leave to file a bill of complaint. The Court granted plaintiffs' motion, 539 U.S. 925 (2003), and referred the case to a Special Master, 540 U.S. 1014 (2003).

4. The Court has before it exceptions to two Reports of the Special Master.

a. The Master's Preliminary Report addressed three motions. At the Master's invitation, the United States filed two briefs and participated in oral argument with respect to those motions.

i. The Preliminary Report recommended denial of North Carolina's motion to dismiss the Commission as a plaintiff based on sovereign immunity. Prelim. Rep. 4-14. The Master concluded "that a non-State party may join a State * * * in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." *Id.* at 5-6. The Master further determined that the Commission and the plaintiff States are "asserting the same claims and seeking the same relief." *Id.* at 6.

ii. The Preliminary Report also recommended denial of plaintiffs' motion for summary judgment on Count 1 of the bill of complaint, which seeks summary enforcement of the Commission's sanctions order. Prelim. Rep. 14-33. The Master concluded "that the Compact does not authorize the Commission to impose monetary sanctions on member States," *id.* at 27, and that, in any event, "North Carolina was not subject to the sanctions authority of the Commission because it withdrew from the Compact before sanctions were imposed," *id.* at 32. The Master also rejected plaintiffs' argument "that North Carolina waived its right to contest the legality of the Commission's sanctions order by refusing to participate in the sanctions hearing." *Ibid.*

iii. The final motion addressed in the Preliminary Report is North Carolina's motion to dismiss for failure to state a claim. Prelim. Rep. 33-43. The Preliminary Report recommended that motion be granted only with respect to Count 1, described above. *Id.* at 34. The Master explained that the remaining counts "assert various legal and equitable claims against North Carolina," *id.* at 34-35, and he rejected North Carolina's argument that plaintiffs "cannot seek a judicial remedy beyond the remedies prescribed by the Compact," *id.* at 34.

b. The Master did not immediately file his Preliminary Report with the Court. Instead, the parties conducted discovery and filed cross motions for summary judgment, which are addressed in the Master's Second Report. The United States did not participate in discovery or in the proceedings before the Special Master with respect to those motions.

i. The first motion addressed in the Second Report is plaintiffs' motion for summary judgment on Count 2, which asks this Court to declare that North Carolina breached the Southeast Compact and to fashion an appropriate remedy. The Master recommended that motion be denied, Second Rep. 8-35, and that North Carolina be granted summary judgment on that count "[f]or substantially the same reasons," *id.* at 35. The Master rejected plaintiffs' contention that the Commission's determination of breach was "conclusive" or "entitled to substantial deference" in this proceeding. *Id.* at 19. The Master also concluded that North Carolina did not violate its obligation under Article 5(C) "to take 'appropriate steps' towards licensing of a disposal facility," *id.* at 20, and he rejected plaintiffs' claim that North Carolina's withdrawal from the Compact violated an implied covenant of good faith and fair dealing, *id.* at 29-35.

ii. The Master's Second Report also discussed, but did not make a recommendation regarding, North Carolina's motion for summary judgment on Counts 3-5, which seek relief on the equitable theories of unjust enrichment, promissory estoppel, and money had and received, respectively. The Master concluded that resolution of those claims would, "[a]t a minimum, * * * require further briefing and argument, and perhaps further discovery." Second Rep. 45. The Master decided not to delay further the filing of his Reports to conduct those proceedings, because he concluded that "there may be no need to consider" those Counts if this Court rejects the recommendations contained in the Master's Preliminary and Second Reports. *Id.* at 41.

SUMMARY OF ARGUMENT

I. North Carolina's motion to dismiss the Commission based on sovereign immunity should be denied. This Court has squarely held that a State's immunity is not violated when a non-State party joins in an original action brought by a State or the United States, so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs. That holding has not been called into doubt by later decisions, and North Carolina provides no valid reason for departing from it.

At this point in the suit, the Commission is pursuing the same claims and seeking the same relief as the plaintiff States. The Court should not entertain North Carolina's argument that the Commission should be dismissed because the plaintiff States cannot ultimately succeed on the claim they are making initially with the Commission—for restitution of the approximately $80 million that North Carolina received to assist it in developing a new regional facility. North Carolina's argument goes to the merits of the plaintiff States' claims, and the Special Master specifi-

cally declined to resolve the "complex issues" (Second Rep. 46) raised by those claims on the ground that an immediate ruling by this Court on the issues addressed in the Preliminary and Second Reports would best advance the efficient resolution of this litigation. The Master's case-management determinations were reasonable, and this Court should not indulge North Carolina's attempt to end-run them.

II. The Court should deny plaintiffs' request for summary enforcement of the Commission's sanctions order because the Compact does not authorize the Commission to impose monetary sanctions against a party State. Although the Compact authorizes "sanctions," the Compact's language and the surrounding context demonstrate that power does not include the ability to impose a monetary penalty.

The two sanctions expressly mentioned in Article 7(F)—suspension of rights and revocation of party status—both deny a member State some or all of the benefits of Compact membership on a going-forward basis. Although other provisions repeatedly mention the possibility of expelling a State that fails to live up to its obligations, nothing in the Compact indicates that the Commission has the authority to levy a substantial monetary sanction against a sovereign State. This silence is particularly telling given that the States traditionally have immunity from monetary assessments, and that several other compacts approved by Congress in the same Act expressly authorize their commissions to require monetary payments by current or former member States. Finally, the Court should reject plaintiffs' assertion that deference is owed to the Commission's assessment about the scope of its own sanctioning authority or to the Commission's determination that North Carolina violated its obligations under the Compact.

ARGUMENT

I. THE COURT SHOULD DENY NORTH CAROLINA'S MOTION TO DISMISS THE COMMISSION BASED ON NORTH CAROLINA'S SOVEREIGN IMMUNITY

North Carolina contends that sovereign immunity principles require dismissal of all claims brought by the Southeast Commission. North Carolina argues (at 27-39) that it has a right not to be a defendant in any action in which the Commission is a plaintiff. North Carolina also asserts (at 39-55) that, even if the Commission could be a plaintiff with respect to claims that were identical to those of the plaintiff States, the Commission's claims must still be dismissed because the States are not entitled to bring the same claims: "as a matter of law and fact, only the Commission can pursue restitution of the $80 million" that it paid to North Carolina to assist in developing a new regional facility. *Id.* at 40.

North Carolina's first exception should be overruled. This Court has never addressed whether States have sovereign immunity from suits brought by entities like the Southeast Commission.[5] But even assuming that they do, that immunity is not violated when a non-State party joins in an original action brought by a State, so long as the non-

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[5] This Court has twice held that a particular Compact Clause entity was not immune from suit by private parties in federal court, and it has stated that "there is good reason not to amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); see *Lake County Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-402 (1979). In its amicus brief in *Original 131*, the United States stated (at 13) that "a suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment."

State party asserts the same claims and seeks the same relief as the other plaintiffs.

As the Special Master correctly determined (Prelim. Rep. 14), at this point in the litigation, "the Commission and the [plaintiff] States are asserting the same claims and seeking the same relief." North Carolina argues that the plaintiff States are not *entitled* to assert some of those claims or seek one of those remedies. But the Special Master reasonably concluded that those issues—which go to the merits of the plaintiff States' claims—could not and need not be resolved at this stage of the litigation. That case-management decision was reasonable, and the Court should not permit North Carolina to conduct an end-run around it.

A. A Non-State Party May Participate In A Suit That Is Properly Instituted Under This Court's Original Jurisdiction So Long As It Does Not Bring New Claims Against A Defendant State

1. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

"Although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts," this Court has viewed "the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)). The Court has determined that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States

enjoyed before the ratification of the Constitution, and which they retain today * * * except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999).

2. This Court has recognized, however, that the Eleventh Amendment does not necessarily bar a non-State party from participating in a suit that is otherwise properly commenced under the Court's original jurisdiction. In *Arizona* v. *California*, No. 8, Original, Arizona sued California to determine their respective rights to use the Colorado River. The United States intervened to assert various water rights on behalf of five Indian Tribes, *Arizona* v. *California*, 373 U.S. 546, 551, 595 (1963), and the Tribes subsequently moved to intervene to assert those claims on their own behalf, *Arizona* v. *California*, 460 U.S. 605, 612 (1983) (*Arizona II*).

This Court unanimously rejected the States' argument that granting the Tribes' motion would "violate[] the Eleventh Amendment." *Arizona II*, 460 U.S. at 614. The Court "[a]ssum[ed], *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe." *Ibid.*; see *Blatchford*, 501 U.S. at 781-782 (so holding). But the Court held that "the States involved no longer may assert that immunity with respect to the subject matter of this action." *Arizona II*, 460 U.S. at 614. The Court reaffirmed that States have no immunity from suits brought by the United States, and it emphasized that "[t]he Tribes d[id] not seek to bring new claims or issues against the States, but only ask[ed] leave to participate in an adjudication of their vital water rights that was commenced by the United States." *Ibid.* Under those circumstances, the Court determined that its "judicial power over the controversy [would] not be enlarged by granting [the Tribes]

leave to intervene" and that the State's sovereign immunity would "not [be] compromised" by doing so. *Ibid.*

Arizona II is directly on point. This Court has long recognized that, by ratifying the Constitution, the States consented to suits by each other, see, *e.g.*, *South Dakota* v. *North Carolina*, 192 U.S. 286, 318 (1904), and four of North Carolina's sister States are plaintiffs in this action. As a result, *Arizona II* establishes that no Eleventh Amendment violation exists so long as the Commission does not "seek to bring new claims or issues against" North Carolina. 460 U.S. at 614. Cf. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981) (permitting private parties to intervene in an original action against a State); *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (noting that "[n]umerous parties" had been permitted to intervene in an original action between two States).[8]

8. a. North Carolina does not directly ask this Court to overrule its unanimous Eleventh Amendment holding in *Arizona II*, and it identifies no warrant for doing so. North Carolina does not assert that the rule announced in *Arizona II* is "unworkable," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991), or that "experience has pointed up the precedent's shortcomings," *Pearson* v. *Callahan*, 129 S. Ct. 808,

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[8] A non-State party, of course, may be precluded from participating on some other basis, not involving the Eleventh Amendment. See *Arizona II*, 460 U.S. at 613-614 (addressing separately the arguments that intervention would violate the Eleventh Amendment and that intervention was unwarranted for other reasons). In *South Carolina* v. *North Carolina*, No. 138, Original, the Court will address the proper standards for intervention by non-State parties in an interstate water adjudication. This case, however, does not involve an attempt by a non-State party to "force [its] way, through intervention, into a dispute between sovereigns." U.S. Amicus Br. at 10, *South Carolina* v. *North Carolina*, *supra*.

816 (2009). *Arizona II* was not "decided by the narrowest of margins" or "over spirited dissents challenging the basic underpinnings of [the Court's] decision[.]" *Payne*, 501 U.S. at 828-829. And its holding has not "been questioned by Members of the Court in later decisions." *Id.* at 829-830. Cf. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676-678 (1999) (noting that four Justices had dissented in *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), and that *Parden* had been criticized and narrowed by later decisions).

b. North Carolina relies principally (at 31-34) on *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). Those cases arose from different facts, concerned different legal questions, and do not at all undermine *Arizona II*.

In *Pennhurst*, the Court held that the Eleventh Amendment bars private parties from suing a state official in federal court for a violation of state law. See 465 U.S. at 103-125. *Pennhurst* was not an original jurisdiction case, and it does not address situations in which the claims of a non-State party are the same as those asserted by a State or the United States. Although the United States was a party to *Pennhurst*, the private parties' claims were not identical to those of the United States. To the contrary, the Court thought it "clear that the United States does not have standing to assert the state-law claims of third parties." *Id.* at 103 n.12. *Pennhurst* also involved the uniquely sensitive issue of a federal court's enforcement of state law against an arm of the State. See *id.* at 106 (stating that "it is difficult to think of a greater intrusion on state sovereignty").

In *County of Oneida*, three Indian Tribes sued two New York counties in federal district court, alleging that the

State of New York had obtained county lands in violation of the Trade and Intercourse Act of 1793, ch. 19, 1 Stat. 329, and that the transaction was void as a result. 470 U.S. at 229. The counties attempted to join the State as a third-party defendant, asserting that the court could exercise ancillary jurisdiction over the counties' cross-claim for indemnity. *Id.* at 250-251. This Court concluded that the Eleventh Amendment barred the cross-claim because it raised a question of state law and because the counties failed to demonstrate that the State had waived its immunity. *Id.* at 251-252. Because neither the United States nor another State was a plaintiff in *County of Oneida*, the Court had no occasion to consider whether and under what circumstances the Eleventh Amendment would have barred the counties from participating in a suit brought by the United States or another State against New York.

Since *Pennhurst* and *County of Oneida* were decided, moreover, the Court rendered a second decision in *Arizona v. California* addressing claims brought by and on behalf of an Indian Tribe. The Court noted that its earlier decision had permitted the Tribes to intervene, without questioning that ruling. See 530 U.S. 392, 399 (2000). And the Court went on to consider further the claims of one of those Tribes, assuming that the Tribe was an appropriate party to the proceeding. See *id.* at 406-418; see also 547 U.S. 150, 151 (2006) (consolidated decree)

c. Contending that sovereign immunity determinations must be made on a claim-by-claim basis, North Carolina suggests repeatedly (at 32-33, 36, 38-39) that the addition of each new plaintiff creates a distinct "claim" for Eleventh Amendment purposes, even if all of the plaintiffs assert that the defendant violated the same legal obligation and seek the same remedy. North Carolina cites no support for that

proposition, and it is contrary to this Court's unanimous holding in *Arizona II*.

North Carolina's argument also is inconsistent with the Court's analysis in *Pennhurst*. *Pennhurst* did not hold that the presence of the United States in the suit was categorically irrelevant for Eleventh Amendment purposes. Instead, the Court's decision was based on the more limited principle that "the United States' presence in the case for *any* purpose does not eliminate the State's immunity for *all* purposes." 465 U.S. at 109 n.12 (emphases added). The Court gave an example, noting that the Eleventh Amendment would bar a federal court from bootstrapping its ability to award an injunction to the United States into an ability to award money damages to a private party. *Ibid.* And as noted above, the Court remarked that it was "clear that the United States d[id] not have standing to assert the state-law claims of third parties." *Ibid.* Both observations would have been unnecessary if North Carolina were correct that the simple addition of a new plaintiff—even if that plaintiff asserts identical claims and seeks the same relief—invariably creates a new "claim" for sovereign immunity purposes.

d. North Carolina is correct (at 35) that this Court has understood sovereign immunity as based on something more than jurisdictional limits. See *Alden*, 527 U.S. at 713, 730. North Carolina also is correct (at 38) that, in circumstances in which States have sovereign immunity, they may restrict any waiver of that immunity to certain claims, see *id.* at 758 (state law claims but not analogous federal law claims), or to suits brought in certain fora, see *College Sav. Bank*, 527 U.S. at 676 (state court but not federal court). But there is no conflict between those principles and *Arizona II*. *Arizona II* simply recognizes that, when a State does not have sovereign immunity against certain claims (as

here, because they were brought by other States), then the State's sovereign immunity "is not compromised" by the participation of an additional party in the suit with respect to that same claim. 460 U.S. at 614.

B. The Commission Is Not Seeking To "Bring New Claims" Against North Carolina

As explained in the previous Section, the Commission's participation in this suit does not implicate North Carolina's sovereign immunity so long as the Commission "do[es] not seek to bring new claims or issues against" North Carolina beyond those asserted by the plaintiff States. *Arizona II*, 460 U.S. at 614. As the Special Master correctly determined (Prelim. Rep. 14), the bill of complaint is consistent with that standard. The complaint identifies the plaintiff States and the Southeast Commission as the plaintiffs (Compl. para. 9); it states the claims jointly on behalf of all the plaintiffs (*id.* paras. 62-86); and it makes no distinctions among the plaintiffs with respect to the relief sought (*id.* Prayer for Relief paras. 1-4).

Nor do any post-filing developments require dismissal of the Commission. The Special Master has recommended that this Court dismiss the portions of the bill of complaint that request enforcement of the Commission's sanctions order, Prelim. Rep. 34, and grant summary judgment to North Carolina with respect to Count 2, Second Rep. 35-40. Those recommendations, however, apply equally to the Commission and the plaintiff States. And although North Carolina excepts to the Master's failure to recommend granting its motion for summary judgment on Counts 3-5 (N.C. Exc. Br. i, 56-59), it does so on grounds that are equally applicable to all the plaintiffs. See note 5, *infra*. Accordingly, because the plaintiff States and the Commission continue to assert the same claims and seek the same

relief, the Commission's continued participation is consistent with *Arizona II*. And if circumstances were to change, North Carolina could at that time renew its motion to dismiss the Commission or to preclude consideration of any claims pressed by the Commission alone.

C. North Carolina's Assertion That The Plaintiff States Have No Claim To The Approximately $80 Million That It Received Does Not Warrant Dismissal Of The Commission

North Carolina does not deny that the plaintiff States and the Commission are asserting the same claims and seeking the same relief. Instead, North Carolina contends (at 40) that its first exception should be granted because, "as a matter of law and fact, only the Commission can pursue restitution of the $80 million" that North Carolina received to assist it in licensing an appropriate facility. But that argument goes to the *merits* of the claims insofar as they are advanced by the plaintiff States, and the Master deferred consideration of the merits of the restitution issue. The Court should not entertain North Carolina's attempt to use a motion to dismiss the Commission on *jurisdictional* grounds as a vehicle for reaching the merits in the face of the Master's deferral.[4]

The Special Master did not extensively discuss and did not make any recommendations with respect to the various

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[4] North Carolina's request for dismissal of "*all claims brought by*" the Commission (N.C. Exep. Br. i) also is overbroad because the Commission has sought relief other than restitution. For example, the complaint asks the Court to declare that the Commission's sanctions order is "subject to enforcement," Prayer for Relief para. 3, and to "[a]ward Plaintiffs such damages, costs and further relief as this Court deems just and proper," *id.* para. 4. Accordingly, even if only the Commission could pursue restitution, such a conclusion would at most warrant a dismissal as to that particular request for relief, and not an across-the-board dismissal of the Commission as a party.

"complex issues" (Second Rep. 46) raised by the plaintiff States' request for restitution. To the contrary, the Master determined that those issues "cannot be resolved now," and he identified various questions that would "require[] further briefing and argument, and possibly further discovery." *Id.* at 41. The Master concluded that judicial efficiency would best be served by deferring consideration of those issues and obtaining an immediate decision by this Court regarding the issues addressed in the Preliminary and Second Reports. *Id.* at 48.

That method of proceeding is reasonable and within the Master's discretion. To be sure, the Master also could have decided to hold off filing any Reports until he was able to recommend a disposition with respect to all of plaintiffs' claims. See 540 U.S. at 1014 (authorizing the Master "to direct subsequent proceedings" and instructing him "to submit such Reports as he may deem appropriate"). But the Master identified appropriate reasons for deferring consideration of whether the plaintiff States may seek restitution, either as a remedy for plaintiffs' breach of contract claim asserted in Count 2 or on one of the various equitable theories alleged in Counts 3-5. Because the Master has recommended that the Court grant summary judgment to North Carolina on the question of liability on Count 2, see Second Rep. 35-40, there may be no need to decide any issues relating to remedy on that Count. *Id.* at 45. And plaintiffs assert the various equitable claims in Counts 3-5 only as an alternative to recovery on Counts 1 and 2. See *id.* at 41 (so stating with respect to Count 2). Accordingly, there "may be no need to consider" whether the plaintiff States may assert those equitable claims if the Court determines that plaintiffs are entitled to relief on Counts 1 or 2. *Ibid.*

Even if the various issues raised by the plaintiff States' request for restitution remain relevant after the Court resolves the parties' other exceptions, the Court should decline North Carolina's request to resolve those issues at this time. As noted, North Carolina is asking the Court to reject some of the plaintiff States' claims on the merits as a predicate to dismissing the Commission based on sovereign immunity. A number of the "complex issues" (Second Rep. 46) that the Special Master identified about the plaintiff States' request for restitution involve delicate issues of interstate relations about which this Court's existing precedents do not provide clear guidance. See *id.* at 41-48. Moreover, further factual development before the Master may reveal that some or all of those issues need not be addressed in this case. Cf. Second Rep. 29 (concluding that it was unnecessary to determine whether a duty of good faith and fair dealing applies to interstate compacts because, even if it did, "the record contains no evidence that North Carolina acted in bad faith"). Accordingly, North Carolina's first exception should be overruled.[5]

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[5] The Court should overrule North Carolina's second exception for similar reasons. In that exception, North Carolina objects to the Special Master's failure to recommend dismissal of Counts 3-5, arguing that "where the parties' relationship concerning a given subject matter is governed by the terms of an express contract, no equitable claim will lie in addition [to] a claim for breach of contract." N.C. Exep. Br. i. As North Carolina acknowledges (*ibid.*), the Special Master has not addressed that argument. In addition, like North Carolina's other arguments about Counts 3-5, this issue may be rendered moot depending on the Court's resolution of Counts 1 and 2.

II. THE SOUTHEAST COMPACT DOES NOT AUTHORIZE THE COMMISSION TO IMPOSE MONETARY SANCTIONS

Plaintiffs contend (at 17-23) that the Special Master erred in concluding that the Southeast Compact does not authorize the Commission to impose monetary sanctions against a party State. That exception should be overruled. The Compact's terms, the Compact's structure, and the reasonable expectations of Congress and the compacting parties all demonstrate that the Special Master's conclusion is correct.[4]

1. An interstate compact is not simply an agreement among the compacting States. When Congress consents to an interstate compact, it "transforms" the parties' agreement "into a law of the United States." *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981). Thus, although the Southeast Compact "is * * * a contract," *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted), the Court interprets it "[j]ust as if [it] were addressing a federal statute." *Virginia* v. *Maryland*, 540 U.S. 56, 66 (2003) (first brackets in original) (quoting *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998)).

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[4] Plaintiffs' list of exceptions also identifies the Special Master's conclusion that "North Carolina did not waive its right to contest the legality of the sanctions proceedings even though it attended and refused to participate in the hearing." Pls.' Exp. 2. Beyond noting that "North Carolina was in attendance [at] but refused to participate" in the hearing (Br. 17), however, plaintiffs do not address that issue in the body of their brief. Under these circumstances, the Court may wish to deem plaintiffs' third exception abandoned. Cf. 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3974.1, at 254-255 (2008) (stating that, in proceedings before the courts of appeals, "[l]itigants must bear in mind that the failure to properly argue their contentions [in the argument section of an opening brief] may well result in a finding of abandonment").

2. a. The language most directly at issue is contained in the first sentence of Article 7(F). That sentence provides:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state.

Compact Art. 7(F), N.C. App. 24a.

Because the Compact does not define the term "sanctions," its proper interpretation starts with "ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). As used in this context, a "sanction" is "a restrictive measure used to punish a specific action or to prevent some future activity." *Webster's Third New International Dictionary* 2009 (1993); accord *Black's Law Dictionary* 1341 (7th ed. 1999) ("A penalty or coercive measure that results from failure to comply with a law, rule, or order.").

Plaintiffs assert (at 18) that a general reference to "sanctions" is best read to include "monetary sanctions." That sometimes may be the case. But a "word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006). Here, the authority upon which petitioner relies—this Court's decision in *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992) (*Department of Energy*)—fails to demonstrate that the term "sanctions" in this Compact includes monetary penalties. By its terms, the statutory provision at issue in *Department of Energy* made clear that its use of the word "sanctions" encompassed "civil penalties." *Id.* at 620 (quoting 33 U.S.C. 1323(a)). For that reason, the question of the permissibility of monetary sanctions was not

even an issue in that case. By contrast, the Southeast Compact contains no such reference to "civil penalties" or otherwise to monetary relief. Accordingly, the holding of *Department of Energy* does not aid plaintiffs here.

Article 7(F)'s provision that possible sanctions "includ[e] suspension of [a State's] rights under this compact and revocation of its status as a party state" fails to demonstrate that the Compact *also* authorizes monetary penalties —and indeed, more nearly suggests the contrary. Of course, plaintiffs are correct (at 19) that "include" is not a term of limitation, and Article 7(F)'s use of that word suggests that the available sanctions are not confined to the two specified measures. At the same time, the Compact's identification of two specific sanctions was presumably intended to serve some purpose, as suggesting the general class of sanctions authorized. And both named sanctions describe a measure that denies a party State some or all of the benefits of Compact membership on a prospective basis, rather than one that directs a backwards-looking monetary payment. As such, the specific references in Article 7(F) indicates sanctions different in both purpose and nature than the ones the Commission sought to impose.

b. Other Compact provisions support the view that Article 7(F) should be understood as confining the Commission to measures that share the core characteristic of withholding benefits of Compact membership. See *Department of Energy*, 503 U.S. at 622 (stating that a "term's context * * * may supply a clarity that the term lacks in isolation"). For example, Article 4 creates the Commission and sets forth eleven specific "duties and powers." Compact Art. 4(E), N.C. App. 9a-18a. Article 4(E)(7) empowers the Commission to designate a host State, and provides that "[t]he Commission shall have the authority to revoke the membership of a party state that willfully creates barriers

to the siting of a needed regional facility." N.C. App. 12a. Another provision authorizes the Commission to "revoke the membership of a party state in accordance with Article 7(F)." Compact Art. 4(E)(11), N.C. App. 13a. By explicitly granting the Commission the power to revoke a party State's membership, Congress and the compacting States could fairly have understood that the Compact also granted the Commission the lesser-included power of suspending a party State's rights or benefits under the Compact, an inference confirmed by the text of Article 7(F). But Article 4(E) contains no indication that the "duties and powers" of the Commission include the ability to compel a party State to pay a potentially substantial monetary sanction.

Similarly, Article 6(B) provides that "[n]o party state shall pass any law or adopt any regulation which is inconsistent with this compact," and that "do[ing] so may jeopardize the membership status of the party state." N.C. App. 21a. Here too, however, the Compact gives no indication that the enactment of an offending law or regulation has the additional effect of subjecting the State to a Commission-imposed monetary sanction.

c. Plaintiffs err in asserting (at 20) that the final sentence of Article 7(F)'s first paragraph is "meaningless" unless the Commission may impose monetary fines. That sentence reads: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Compact Art. 7(F), N.C. App. 25a.

The "rights and obligations" of party status referred to in this sentence are set out in Article 3 of the Compact, whose caption reads "rights and obligations." N.C. App. 6a. For example, Article 3(A) provides that "each party state" shall "have the right" to access and use a regional storage

facility. N.C. App. 6a. Article 3(C) requires "[e]ach party state [to] establish the capability" to serve as a host State, and Article 3(B) states that a "party state" that is not a host State "may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility." N.C. App. 7a.

On its own terms—and especially when read in light of Article 3—the sentence on which plaintiffs rely actually undermines their claim that the Commission may impose monetary sanctions. That sentence links a party State's ability to exercise the rights, and its duty to comply with the obligations, of Compact membership to the date of the Commission's sanctions order, something that makes perfect sense if the authorized sanctions relate to Compact membership. On this reading, the "or as provided" clause simply grants the Commission leeway to decide how to implement a suspension or revocation order, such as by permitting generators from a State whose rights have been suspended a reasonable amount of time to make alternate arrangements or by relieving a State whose expulsion will not take effect until a later date of some of the obligations of Compact membership. In contrast, it is difficult to imagine why or how the imposition of a monetary sanction would have any impact on an offending State's "rights and obligations" under the Compact. The imposition of a fine is perfectly consistent with the continuation of the rights and obligations of group membership

d. The Southeast Compact was drafted against, and should be interpreted in light of, background assumptions about state sovereignty. See Compact Art. 3, N.C. App. 6a ("The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights."). One traditional aspect of

that sovereignty is an immunity from monetary assessments, whether imposed by courts or non-judicial actors. See, *e.g.*, *FMC* v. *South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974). Given that tradition, if Congress and the States had intended to empower the Commission to impose multi-million dollar monetary sanctions on a State, potentially affecting all its sovereign functions, the Compact would have expressly granted such authority.

Requiring a clear statement in this context would serve several purposes. Here, as elsewhere, it would ensure that the legislature of each State that joined the Compact, as well as Congress in approving it, "has in fact faced" and considered the question whether a non-judicial compact commission should be permitted to impose a monetary sanction against a sovereign State. *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (citation omitted). In addition, a presumption that a compact commission may not impose monetary sanctions against a State absent a clear statement to that effect would serve the broader goal—which is embodied in the Compact Clause itself, U.S. Const. Art. I, § 10, Cl. 3—of encouraging States to resolve their differences and address issues of multistate and national concern through mutual agreement. Under such a rule, States could be assured that, by entering into an interstate compact, they will not inadvertently expose themselves to uncertain and potentially substantial monetary liability without the benefit of proceedings in a judicial forum.

Plaintiffs assert (at 20) that "it is inappropriate to impose a clear-statement rule on the interpretation of a contract among co-equal sovereign states." But the Southeast Compact is not simply a "contract among" the party States. It is also "a law of the United States," *Texas* v. *New Mexico*, 482 U.S. at 128, and is thus subject to the same princi-

ples that govern the interpretation of federal statutes, which are subject to a number of clear-statement rules.

e. The Southeast Compact's failure to make any mention of a power to impose monetary sanctions is particularly significant in light of other similar interstate compacts specifically granting such power. Several interstate compacts addressing treatment of low-level radioactive waste—approved by Congress in the selfsame Act as the Southeast Compact—expressly authorize their commissions to fine member States. See *Texas* v. *New Mexico*, 462 U.S. 554, 565 (1983) (citing "[o]ther interstate compacts, approved by Congress contemporaneously," in construing the Pecos River Compact).[7] For example, the Northeast Interstate Low-Level Radioactive Waste Management Compact authorizes its commission to "impose sanctions, including but not limited to, *fines*, suspension of privileges and revocation of the membership of a party state." Art. IV(1)(14), 99 Stat. 1915 (emphasis added). The Central Interstate Low-Level Radioactive Waste Compact empowers its commission to

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[7] Plaintiffs assert (at 22 n.7) that *Texas* v. *New Mexico* is inapposite because "the undisputed record shows that the party States were not aware of the language of other interstate low-level radioactive waste compacts when they negotiated the Southeast Compact." But the Court did not undertake such an inquiry in *Texas* v. *New Mexico*, and plaintiffs cite no evidence that the drafters of the Pecos River Compact were aware of the language of the other compacts to which the Court referred. In any event, the Compact at issue here and the others discussed in the text were enacted by Congress; they are not merely agreements among the participating States. The simultaneous enactment of the compacts in a single Act of Congress reinforces the conclusion that the differences in their sanctions provisions—and in particular the absence of any provision for monetary sanctions in the Southeast Compact—should be given effect. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

require a party State whose membership is revoked to "pay to the Commission" certain specified monetary penalties. Art. VII(e), 99 Stat. 1870. And the Central Midwest Interstate Low-Level Radioactive Waste Compact directly addresses a situation that tracks what plaintiffs assert occurred here—and provide for monetary penalties in response. That compact provides that, if "[a] designated host state * * * withdraws from the compact * * * prior to fulfilling its obligations," the compact commission "shall * * * assess[]" against that State "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Art. VIII(f), 99 Stat. 1891. The Southeast Compact contains no comparable provision.

f. There is no reason to believe that an ability to impose monetary sanctions was necessary to ensure the effectiveness of the Southeast Compact. Cf. Compact Art. 9, N.C. App. 27a-28a ("The provisions of this compact shall be liberally construed to give effect to the purposes thereof."). The Northwest Interstate Compact on Low-Level Radioactive Waste Management Art. V, 99 Stat. 1862-1863, for example, includes no provision at all for the Commission to sanction party States. See also Rocky Mountain Low-Level Radioactive Waste Compact Art. VII(e) and (f), VIII(e), 99 Stat. 1908-1909 (authorizing compact commission to impose a "civil penalty" against "[a]ny person who violates" certain provisions, but only authorizing "exclus[ion]" of a party State).[5] As the Master observed (Prelim. Rep. 21), a State

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[5] Plaintiffs contend (at 22) that, "[u]nder the Special Master's reasoning," the comparison between the Rocky Mountain Compact's authorization of "exclusion" and the Southeast Compact's authorization of "sanctions" denotes that the Southeast Compact "authorize[s] sanctions *beyond* exclusion." As explained above, the Southeast Compact does authorize sanctions other than exclusion. See p. 22, *supra*. But the

that loses compact membership necessarily loses the benefits expected to attach to that membership—including the right to dispose of its own waste at a regional facility. See Compact Art. 3(A), N.C. App. 6a. And even though the Commission cannot itself impose monetary sanctions, a State that breaches the Compact and then withdraws is not necessarily protected from monetary liability. Rather, as the Master also recognized (Prelim. Rep. 37-40), this Court may award damages or other appropriate relief for breach of an interstate compact. See, e.g., *Texas* v. *New Mexico*, 482 U.S. at 128; *Texas* v. *New Mexico*, 462 U.S. at 569-570.

3. Plaintiffs suggest (at 18) that the Court should defer to the Commission's determination that it can impose monetary sanctions. As the Special Master correctly concluded (Prelim. Rep. 26-27), the Commission's views about the scope of its own sanctioning authority—which appear to have been first articulated in the sanction proceeding at issue here—do not warrant any special deference. An interstate compact entity that consists of representatives of member States, see Compact Art. 4(A), N.C. App. 8a, is not equivalent to a federal agency charged with administering an Act of Congress. The Compact does not grant the Commission any general authority to construe its terms, cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989), and the Compact contains no more specific indication that Congress assigned to the Commission the authority to determine the scope of permissible sanctions, cf. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). While the Commission's well reasoned views may constitute a body of experience and informed judgment to which

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question here is: *Which* sanctions other than exclusion does the Compact authorize? In resolving that question, the relevant comparison is with compacts that, unlike the Southeast Compact, make clear that they authorize monetary assessments against a party State.

courts may properly resort for guidance, its views about the scope of its own powers cannot supplant a fair reading of the Compact's terms. Cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 227-228 (2001).

4. Plaintiffs also err in contending (at 25-30) that this Court should defer to the Commission's determination that North Carolina violated its obligations under the Compact. Plaintiffs rest that assertion on language in the second sentence of Article 7(C), which reads: "The Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact." N.C. App. 23a.

As its full text suggests—and the surrounding context confirms—the sentence in question does not mean what plaintiffs assert. The Compact does not provide that "this suit may be maintained only as one for judicial review of the Commission's" own determination of breach. *Texas* v. *New Mexico*, 462 U.S. at 567. Moreover, the provision on which plaintiffs rely is not contained in Article 4(E), which addresses the general "duties and powers" of the Commission, N.C. App. 9a-18a, or in Article 7(F), which addresses situations in which a "party state * * * fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state," N.C. App. 24a. Instead, the provision is contained in Section (C) of Article 7, which is preceded and followed by other sections in Article 7 that describe the process by which States become eligible for compact membership and the initial organization of the Commission. Indeed, Section (C)'s own first sentence addresses the process by which eligible States become Compact members. N.C. App. 23a.

When viewed in that context, the function of the sentence in question becomes clear: it grants to the Commission, rather than to individual party States or prospective member States, ultimate authority to determine whether a prospective member has satisfied the conditions for Compact membership. At any rate, the language of Article 7(C) is insufficient to displace this Court's independent judgment in the exercise its constitutionally prescribed role as arbiter of controversies between States. See *Texas* v. *New Mexico*, 462 U.S. at 566-571. Furthermore, the Commission's finding of a violation here occurred in a proceeding to impose monetary sanctions, which is a power that the Commission does not have. For those reasons, plaintiffs' fourth exception should be overruled as well.

5. Plaintiffs' second exception addresses the Master's alternative recommendation that the sanctions order is invalid because North Carolina "withdrew from the Compact before sanctions were imposed." Prelim. Rep. 32. Because that exception presupposes that the Commission may sometimes impose monetary sanctions, it should be overruled as well.[9]

---

[9] If the Court sustains plaintiffs' first exception and concludes that the Commission can impose monetary sanctions, it probably should sustain plaintiffs' second exception as well. Were the Compact construed to permit the Commission to order North Carolina to return the funds it received during its Compact membership, North Carolina should not be allowed to avoid that obligation by exercising a unilateral right to withdraw. Perhaps for that reason, other compacts that expressly permit their commissions to require monetary payments also provide that the duty to make such payments survives termination of compact membership. See Central Interstate Compact Art. VII(d) and (e), 99 Stat. 1870; Central Midwest Compact Art. VIII(d) and (f), 99 Stat. 1891.

CONCLUSION

Plaintiffs' first, second, and fourth exceptions should be overruled. Both of North Carolina's exceptions should be overruled.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
CHARLES FINDLAY
BARCLAY T. SAMFORD
Attorneys

JULY 2009

Supreme Court, U.S.
FILED
AUG 10 2009
OFFICE OF THE CLERK

No. 132, ORIGINAL

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary Report and the Second Report of the Special Master

THE STATE OF NORTH CAROLINA'S REPLY TO EXCEPTIONS BY PLAINTIFFS TO THE REPORTS OF THE SPECIAL MASTER

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

August 2009

**Counsel of Record*

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Southeast Compact Commission has claimed unreviewable authority to award itself $80 million - an award beyond its remedial power, entered against a sovereign State outside its jurisdiction, for a breach of the Compact that never happened. The Special Master correctly determined that the Commission's *ultra vires* sanctions award cannot be summarily enforced, and that its Compact breach claim lacks legal and factual merit. Plaintiffs' exceptions are likewise without merit.

I. The sanctions order cannot be summarily enforced for two reasons. *First*, the Commission lacks the power to impose monetary sanctions under the terms of the Compact. Unlike several other (but not all) contemporaneously enacted compacts, which expressly permit their commissions to impose monetary awards, the Southeast Compact Commission's remedial power is limited to revocation and suspension of Compact rights. Plaintiffs' contrary reading would give the Commission implausibly extreme sanctions authority, and cannot be reconciled with the Compact's text and structure.

Second, North Carolina withdrew from the Compact before the sanctions process was even initiated. Again, unlike several other (but not all) contemporaneously enacted compacts, which expressly permit their commissions to sanction former party States for conduct occurring during membership, the Southeast Compact Commission's sanctions authority expressly applies *only* to "party States." Plaintiffs' contrary reading would make nonsense of the very

language they cite. And the fact that a State cannot be sanctioned by the Commission after withdrawal does not mean the State escapes *liability* for conduct during membership - if that conduct breached the Compact, the State can still be held liable in court for the breach.

II. North Carolina did not breach the Compact, and is entitled to summary judgment based on the undisputed facts.

A. The Commission's breach determination is not entitled to deference: the Commission is not the Compact's exclusive forum for resolving disputes; the Commission's authority over member States is nothing like the authority of a federal administrative agency or a private commercial arbitrator; and North Carolina was not subject to its authority in any event.

B. Plaintiffs' two contract-breach theories lack merit. *First*, North Carolina did not breach by exercising its right to withdraw. Interstate compacts generally cannot be subject to unwritten limits on express rights, and the Southeast Compact in particular cannot be read as implicitly barring a host States from withdrawing, given *other* explicit limits on withdrawal set forth in the Compact as well as in other contemporaneously enacted compacts.

Second, North Carolina did not breach its Compact obligation to take "appropriate steps" toward licensing when it suspended operations in December 1997, following the Commission's declaration that it would no longer provide financial assistance for the licensing

process. The ambiguous phrase "appropriate steps" is properly construed by the parties' course of performance, which demonstrates that the parties expressly agreed from the outset that a host State could not realistically bear the costs of licensing alone, and that significant financial assistance was "necessary and appropriate" to facilitate the licensing process. The Commission was not *required* to provide such assistance; rather, its voluntary decision to do so confirms the parties' understanding that it was not realistically possible, and therefore not an "appropriate step," for a host State to pursue the licensing process without financial assistance.

III. Plaintiffs' restitution argument is relevant only if the Court holds that North Carolina breached the Compact. Even if it does, restitution is not an available remedy for breach here. Under black-letter law, restitution is available only *to the party who provided funds*. Only the Commission provided funds to North Carolina - the plaintiff States provided no financial assistance. Because the Commission is not a party to the Compact, it cannot pursue remedies for its breach.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE SANCTIONS ORDER SHOULD NOT BE SUMMARILY ENFORCED.

Count I of the Complaint seeks summary enforcement of the Commission's sanctions order. The

Special Master recommended dismissal of that Count for two reasons: (1) the Compact "does not authorize the Commission to impose monetary sanctions against member States," and (2) "North Carolina withdrew from the Compact prior to the imposition of sanctions." P.R. 15. Both recommendations are correct.[1]

A. The Compact Does Not Empower The Commission To Impose Monetary Sanctions.

The Special Master correctly concluded that the Compact does not confer on the Commission the power to levy monetary sanctions against the treasuries of member States. P.R. 16-27. As the Solicitor General explained below, "the Compact authorizes the Commission to sanction a State that refuses to fulfill its Compact obligations *only* by denying that State the benefits of Compact membership." U.S. Supp. Br. in Response to Mot. to Dismiss 7 (emphasis added); *see* U.S. Br. 20-30.

1. Analysis of the Commission's sanctions power must begin with the Compact provision enumerating the commission's powers, Article 4(E). According to that provision: "The Commission has the following

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[1] Plaintiffs' third stated exception asserts that North Carolina "waive[d] its right to contest the legality of the sanctions proceedings" because it did not participate in the hearing. As the Solicitor General notes, plaintiffs waived this exception by failing to address it in their brief. U.S. Br. 20 n.6. And it is wrong for the reasons stated by the Special Master. P.R. 32-33.

duties and powers," which are specifically identified thereafter.

The eleventh of the enumerated "powers and duties" of the Commission identifies the scope of the Commission's sanctions power: "(11) To revoke the membership of a party state in accordance with Article 7(F)." Article 4(E)(11). Article 7(F), in turn, is the provision that describes the sanctions process. Article 4(E)(11) thus explicitly empowers the Commission to issue the sanctions contemplated in Article 7(F). And the only sanction power conferred by Article 4(E)(11) is the power to revoke the membership status of a member State.

That power excludes monetary sanctions, but is consistent with the terms of the sanction procedures clause it cross-references, Article 7(F), which states that a breaching "party state" "may be subject to sanctions by the Commission, *including suspension of its rights under this compact and revocation of its status as a party state*" (emphasis added). The remainder of the paragraph details the procedures for imposing sanctions, providing specific limits on the revocation of party status, and stating that "rights and obligations incurred by being declared a party state under the compact" continue until expressly altered by a sanction affecting those rights.

The structure of that provision shows that suspension of membership rights is understood to be a lesser power, encompassed by the greater power - conferred separately by Article 4(E)(11) - to revoke the rights of membership altogether. U.S. Br. 23. But

what Article 7(F) does *not* provide, either expressly or by implication, is the qualitatively *different* power to impose *monetary* sanctions.

2. That the sanctions referred to in Article 7(F) do not go beyond compact-rights-related sanctions is confirmed in two ways by the Compact's terms and structure. The first is a separate provision, Article 6(B), which prohibits member States from "pass[ing] any law or adopt[ing] any regulation which is inconsistent with this compact." "To do so," this provision warns, "may jeopardize the membership status of the party state." *Id.* This is another provision that refers to possible sanctions for breach, and again the only type of sanction expressed relates to membership rights. U.S. Br. 23.

The second confirmation of the Commission's limited sanction power is the interpretive canon *esjudem generis*, under which "the meaning of a general term in a contract is limited by accompanying specific limitations." 5 *Corbin on Contracts*, § 24.28, at 309 (rev. ed. 1988). Accordingly, "any meaning given to the general term must have a reasonable degree of similarity to the items mentioned." *Id.*; *cf. Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("words . . . are known by their companions"). The only types of sanctions expressly mentioned in Article 7(F) relate to the exercise of Compact rights. They are not of the same "kind or character" as the monetary award Commission conferred on itself.

3. The Compact's omission of any reference to monetary penalties stands in telling contrast to the

language of the other compacts approved by the same Act of Congress. P.R. 23-24; U.S. Br. 26-27; *see Texas v. New Mexico*, 462 U.S. 554, 565 (1983) (construing compact by reference to other contemporaneously enacted compacts). The Northeast Compact uses language nearly identical to the Southeast Compact in vesting its commission with sanctioning authority, except that the Northeast Compact *also* expressly authorizes its commission to "impose sanctions, *including but not limited to, fines*, suspension of privileges and revocation of the membership of a party state . . . ." Art. IV(i)(14), 99 Stat. 1909, 1915 (1986). The Central Compact likewise permits its commission to exact "pay[ment] . . . for a period not to exceed five-years from the date of notice of revocation, an amount determined by the Commission based on the anticipated fees which the generators of such party state would have paid to each regional facility and an amount equal to that which such party state would have contributed," as sanction for a State's failure to "comply with the terms of this compact or fulfill its obligations hereunder." Central Compact, Art. VII(e), 99 Stat. 1863, 1870 (1986). Most striking of all, the Central Midwest Compact provides that a "designated host state which withdraws from the compact after 90 days and prior to fulfilling its obligations shall be assessed a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Art. VIII(f), 99 Stat. 1880, 1891 (1986).

The Southeast Compact is devoid of any such provisions. Especially given the repeatedly and contemporaneously demonstrated ability of Congress

and the States to enact compact provisions expressly allowing compact commissions to impose monetary sanctions, this Court cannot renegotiate the bargain reflected in the terms of *this* Compact by writing into it a Commission power Congress and the States did not include. *See Texas v. New Mexico*, 462 U.S. at 565 (the "Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it").

Plaintiffs have no serious answer to the distinction between the Southeast Compact's limited sanctions provision and the sanctions provisions of other compacts expressly authorizing monetary sanctions. Their main argument - that there is no evidence that compact negotiators were aware of other compacts' texts (Pls. Br. 21-22) - is manifestly frivolous. In construing the compact in *Texas v. New Mexico* by reference to other contemporaneously enacted compacts, this Court cited no evidence that the compact drafters were aware of other compacts' texts. *See* 462 U.S. at 565; U.S. Br. 26 n.7. And the Southeast Compact and other compacts, in any event, "are not merely agreements among the participating States," but were "enacted by Congress . . . in a single Act." U.S. Br. 26 n.7.

Plaintiffs' other argument is equally misguided. They point to the Rocky Mountain Compact, which "does not authorize sanctions generally; . . . only exclusion." Pls. Br. 22. Plaintiffs infer that this means the Rocky Mountain Compact "generally forbids sanctions," *id.*, as if that somehow undermined the Special Master's analysis. It does not. Notably, the

Northwest Compact *also* provides no sanction power to its commission. The complete lack of any commission sanction power in those compacts hardly means, as plaintiffs contend, that those commissions are free to impose whatever broad sanctions they decide to impose. The opposite is true: those commissions *lack the power to impose any sanctions*, leaving enforcement solely to the courts. Those compacts underscore that the limited sanction power authorized in the Southeast Compact reflects a substantive *choice*: Congress and the party States could have granted the Commission more sanction power (as in the Northeast, Central, and Central Midwest Compacts), or they could have granted it less (as in the Northeast and Rocky Mountain Compacts). Instead they granted the Commission power to suspend or revoke rights, no more and no less.

4. Plaintiffs also rely heavily on Article 7(F)'s description of potential sanctions as "including" the suspension and revocation of rights. Plaintiffs note that "including" is "*usually* a term of enlargement, and not of limitation." Pls. Br. 19 (emphasis added; quotation omitted). And because the term "sanction" linguistically encompasses any "penalty or coercive measure," *id.* (quoting *Black's Law Dictionary* 1341 (7th ed. 1999)), it must follow, say plaintiffs, that the Commission's sanctions power includes monetary sanctions.

Plaintiffs are wrong. To start, as already noted, Article 7(F) is not the Compact provision that establishes the Commission's sanction power - that provision is Article 4(E)(11), which specifically grants

the Commission power "to revoke the membership of a party state." If the "including" phrase in Article 7(F) tacitly conferred on the Commission power to impose *any* "penalty or coercive" measure on party States, as plaintiffs insist, then there would have been no reason to specify one type of sanction in Article 4(E)(11). On plaintiffs' reading, that provision is meaningless surplusage. *See FCC v. Nextwave Pers. Commc'n, Inc.*, 537 U.S. 293, 302 (2003) (a reading of statutory terms that renders language superfluous "of course . . . must be rejected"). Indeed, Article 7(F)'s "including" phrase *itself* would be surplusage - if "sanctions" already includes any penalty or coercive measure within the term's broad meaning, there would be no reason to specify suspension or revocation of party rights as examples of such measures. The more sensible construction, consistent with the context and the *ejusdem generis* canon, is that the "including" phrase identifies the *type* of sanctions a party State can expect from the Commission, i.e., rights-related sanctions.

Plaintiffs' own citation notes that "including" is only *usually* a term of enlargement, confirming that it sometimes operates to introduce examples establishing the limits of the category. In *Dong v. Smithsonian Institute*, 125 F.3d 877, 880 (D.C. Cir. 1997), for instance, the court read examples following "including" to express a narrower "unifying theme," where the plaintiff could not point to a coherent larger theme. That is certainly true here. As the Special Master observed, plaintiffs "seem unable to articulate any clear principle that would limit the range of sanctions available to the Commission if the Compact is interpreted to authorize sanctions other than

suspension of rights and revocation of party status." P.R. 18. The term "sanction" includes *many* kinds of penalties, *none* of which could plausibly be considered within the Commission's power under the Compact. The "paradigmatic" sanction, for instance, is *imprisonment*, according to one of the primary cases plaintiffs themselves cited below. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994). As this example demonstrates, the Commission plainly does not possess power to impose just *any* "sanction," as that term is broadly defined. If the Commission could impose any measure that would "punish" or "coerce" a compact State, then it could impose punitive fines - as plaintiffs themselves remarkably insist, P.R. 18 (quoting oral argument) - or other even more implausible penalties. *Id.*

It is thus evident that the term "sanction," as used in the Compact, was *not* intended to grant the Commission powers commensurate with the term's broadest ordinary usage. Rather, its scope must be limited by the context in which it is used. *See Dolan v. USPS*, 546 U.S. 481, 486 (2006) ("[a] word in a statute may or may not extend to the outer limits of its definitional possibilities"). This Court so held in the only case cited by plaintiffs for the meaning of "sanctions," *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992). Truncating a quotation from that case, plaintiffs suggest that the broad term "sanction" is "spacious enough to cover not only what we have called punitive fines, but coercive ones as well." *Id.* at 621. The rest of sentence - omitted by the plaintiffs - continues: ". . . and use of the term carries no necessary implication that a reference to punitive fines

is intended." *Id.* In other words, the case means the opposite of what plaintiffs say: the term "sanction" does *not* always mean any penalty or coercive measure, but must be interpreted according to its context. As the Court states in another passage ignored by plaintiffs: "The term's context, of course, may supply a clarity that the term lacks in isolation." *Id.* at 622. The Court then performs a close reading of the term's context within the statute, deriving from that context a specific meaning of "sanction" as *excluding* punitive fines, which normally would be well within the meaning of the term. *Id.*

Plaintiffs disdain such contextual analysis here, because they know its results are fatal to their cause. Every reference to "sanctions" in the Compact explicitly relates to, or only makes sense as relating to, the power to suspend or revoke rights.

5. There is no merit to plaintiffs' suggestion (Pls. Br. 19-20) that monetary sanctions are necessary to give meaning to the last sentence of Article 7(F)'s first paragraph, which provides: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." According to plaintiffs, this phrase authorizes sanctions against party states after they have withdrawn, which could not logically include suspension or revocation of compact rights. This is wrong in two respects.

First, the premise is incorrect: nothing in the phrase authorizes the Commission to impose sanctions

on party States after they have withdrawn. To the contrary, the phrase expressly refers to the rights and obligations *of party states* - once a state withdraws and thus is *not* a party State, it necessarily *no longer has* the rights and obligations of a party state.

Second, properly construed, the phrase actually refutes plaintiffs' construction of the Commission's sanctions power. U.S. Br. 24. By its terms, the phrase directly "links" the "rights and obligations" of Compact membership to the date of a sanctions order, and restates the Commission's authority to provide in the sanctions order whether and how those rights and obligations will continue. *Id.* A monetary penalty, by contrast, has nothing to do with the party States' Compact rights and obligations. The phrase on which plaintiffs rely so heavily is yet another example of language referring solely to Compact membership as the basis for sanction.

6. Finally, plaintiffs argued below that the remedy of suspension or revocation of Compact rights is inadequate, and must be supplemented by monetary penalties, because Compact rights themselves are worthless. They have apparently abandoned that position, and rightly so - its premise is obviously wrong: "[T]he Commission's power to revoke the membership of a party State or to limit or suspend its rights under the Compact constitute serious sanctions," in at least two respects. P.R. 21. First, the party state would lose presumably valuable "benefits of membership," including the right to use regional waste facilities. *Id.* Second, host states would lose the additional significant benefit of "all future revenue

generated by operating the region's waste disposal facility." *Id.* Suspending or expelling a host state, in other words, "would not only deprive [the] host State of the right to dispose of its own waste, but also deny it the opportunity to recoup its expenditures." *Id.* at 22.

For all these reasons, the Compact cannot plausibly be construed as tacitly granting the Commission the authority to impose monetary penalties.[2]

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[2] The Special Master also invoked a "clear statement" rule, endorsed by the Solicitor General, which would counsel against interpreting any compact as authorizing monetary penalties absent a clear statement to that effect. P.R. 20; U.S. Br. 24-26. North Carolina certainly agrees that a "clear statement" rule should apply, although the rule is hardly needed to find that the Commission lacks power to impose monetary sanctions. Indeed, the Solicitor General invokes the rule only after explaining at length why the Commission lacks such power under the Compact's plain terms. U.S. Br. 21-24. In any event, there is no merit to plaintiffs' argument that such a rule cannot be applied to a Compact involving "coequal sovereigns" (Pls. Br. 21), for the reasons explained below, *infra* at 40.

B. The Sanctions Order Has No Application To North Carolina, Which Was Not A Party State When The Sanctions Hearing Was Held And When The Sanctions Order Was Issued.

The Special Master also correctly determined that "North Carolina was not subject to the sanctions authority of the Commission because it withdrew from the Compact before sanctions were imposed." P.R. 32.

1. a. The express terms of the Compact unambiguously limit the Commission's sanctions authority to States that are parties to the Compact at the time sanctions are imposed. According to the Compact:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state.

Article 7(F). By its plain terms this provision authorizes the imposition of sanctions only against "party states." Further, the express specification of permissible sanctions identifies only actions that *could* be applied to party States, *e.g.*, suspension of rights under the Compact and revocation of status as a party State. And as discussed above, every other Compact provision referring explicitly or implicitly to sanctions

relates to Compact rights and membership, which logically would not apply to non-party states.

North Carolina was not subject to the Commission's sanctions power because by the time the sanctions procedure was initiated - and certainly by the time sanctions were imposed - North Carolina was no longer a "party state" under the Compact. North Carolina exercised its Article 7(G) right to withdraw effective July 26, 1999. Complaint ¶ 50; *see also* 1999 N.C. Session Laws 357 (state law repealing Chapter 104F of N.C. General Statutes (adoption of Compact) and withdrawing from Compact). The Commission did not approve a sanctions inquiry until August 1999, it did not notify North Carolina of any "hearing" until November 8, 1999, it did not hold its so-called "hearing" until December 8, 1999, and it did not vote to impose sanctions until December 9, 1999 - more than four months after North Carolina ceased being a Compact party State. Complaint ¶¶ 51, 52, 55. Nobody disputes that North Carolina was not a party State when the sanctions inquiry was conducted and sanctions were imposed. Accordingly, the Commission had no authority under Article 7(F) to impose sanctions of any kind on North Carolina.

b. In this respect the Compact again differs materially from the other interstate compacts approved in the same congressional Act. *See supra* at 6-9. Unlike the Southeast Compact, other compacts expressly authorize the imposition of sanctions on a former State for conduct occurring while it was a member. Some compacts specifically state that "[w]ithdrawal does not affect any liability . . .

chargeable to a party state prior to the time of such withdrawal." Central Midwest Compact, Art. VIII(d), 99 Stat. 1880, 1891 (1986); *accord* Midwest Compact, Art. VIII(e), 99 Stat. 1892, 1900 (1986) (same); Northeast Compact, Art. VIII(h), 99 Stat. 1909, 1922 (1986) (similar). And some compacts specifically declare that withdrawals are not legally effective until years after the member gives formal notice of its withdrawal, ensuring that they remain subject to their commissions' sanctions authority for conduct prior to the withdrawal notice. *See* Central Midwest Compact, Art. VIII(d), 99 Stat. at 1891 ("no withdrawal may take effect until 5 years after the governor of the withdrawing state gives notice in writing of the withdrawal to the Commission"); Midwest Compact, Art. VIII(e), 99 Stat. at 1900 (same). The Southeast Compact includes no such provisions. Nor does it even include a "catch-all" empowering provision which authorizes its enforcing commission to "[t]ake any action which is appropriate and necessary to perform its duties and functions as provided in this compact," Central Midwest Compact, Art. III(i)(5), 99 Stat. at 1885, beyond the power to "[s]uspend the privileges or revoke the membership of a party state," *id.* Art. III(i)(6), 99 Stat. at 1885.

The presence of provisions in the compacts negotiated by other States and approved by Congress along with the Southeast Compact only confirms what the Southeast Compact's own language already makes clear: the Commission's sanctions authority does not extend to party States that have withdrawn from the Compact. P.R. 29.

c. That conclusion is further underscored by the one major limitation on party States' withdrawal rights that was added to the Compact in 1989: thirty days after the second host State commences operation of a disposal facility, party States no longer will be able to withdraw unilaterally, but will require unanimous consent of the Compact's members for withdrawal. Article 7(H). Unlike the unconditional withdrawal right applicable when North Carolina withdrew, the new Article 7(H) withdrawal provision *will* enable the Commission to regulate - and impose sanctions on - a party State that seeks to withdraw unilaterally from the Compact. The Article 7(G) withdrawal right includes no such limitation.[3]

2. Plaintiffs' objections to the Special Master's analysis misconstrue both his analysis and the Compact.

a. Plaintiffs' primary contention is that Article 7(F) expressly authorizes the Commission to sanction former party States. They rely on this passage:

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[3] Plaintiffs wholly ignore Article 7(H) here, no doubt because they had no good answer to it below. Plaintiffs argued that Article 7(H) "*illustrates* and *exemplifies* the member states' and Congress's recognition that expulsion and suspension are entirely inadequate to enforce the Compact's obligation." Pls. Opp. to Mot. Dismiss 8. The argument is inexplicable. To the extent Article 7(H) indicates dissatisfaction with the Commission's rights-related remedial power, that only confirms the parties' understanding that the power is limited in that way.

"Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction."

As plaintiffs read this language, all the "rights and obligations" of a party State continue *even beyond withdrawal from the Compact*, up to any point in the future when (and if) sanctions are imposed. On this reading, it is only the imposition of sanctions that can terminate "rights and obligations" under the Compact - withdrawal would have no legal consequence whatsoever.

This makes no sense. To start, under plaintiffs' theory that Compact "rights and obligations" carry forward past withdrawal unless and until a sanction is imposed, the Commission could impose sanctions on a former party State at *any time* in the future, so long as the ostensible "hook" for the sanctions is conduct that occurred during the State's membership in the Compact. The Commission could, for example, choose today to subject South Carolina to sanctions for acts committed by South Carolina prior to its withdrawal from the Compact. That is not a plausible reading of the Compact.

Further, plaintiffs' reading ignores half the provision. On their theory, a party State's "rights" would survive withdrawal, just like its "obligations." But plaintiffs cannot explain how a State could enforce its "rights" under the Compact once it has legally withdrawn and is no longer a party State. Nor can

plaintiffs explain what happens to these post-withdrawal rights if no sanctions are ever imposed - presumably, but nonsensically, they simply last forever. On plaintiffs' theory, the Compact's enactors must simply have erred in providing that a party State's "rights" survive along with its "obligations."

By contrast, the entire phrase is readily understandable if the Commission has authority only to sanction *current party States*. The Commission has authority to suspend or revoke the rights of a party State, but until such a sanction is actually imposed, the party State retains all of its rights and obligations under the Compact. The State thus cannot use the pendency of a sanction inquiry to avoid its obligations (unless it withdraws outright); nor can the Commission suspend or revoke rights preliminarily, before sanctions process is complete. Thus, although the phrase is nonsense under plaintiffs' reading, it is perfectly sensible under the Special Master's analysis.

b. Plaintiffs' reading of the "rights and obligations" phrase is also undermined by other compacts. P.R. 31-32. As already noted, several compacts explicitly provide that withdrawal does not affect "liability" that is "chargeable" to a State prior to its withdrawal, and others impose specific limitations on withdrawal akin to the not-yet-operative Article 7(H). *Supra* at 16-17. Plaintiffs' response is simply to assert, with no reasoning or justification whatsoever, that Article 7(F) *does* provide exactly the same clear authorization other compacts provides. Pls. Br. 24. It plainly does not, as already shown. And even if the

phrase were ambiguous, the clarity with which other compacts speak to post-withdrawal liability counsels against reading similar liability into the Southeast Compact, where its enactors chose not to adopt it expressly. P.R. 29 ("The presence of these express limitations on withdrawal [in other contemporaneously approved compacts] suggests that such limitations should not be read into the [Southeast] Compact.").

c. Plaintiffs assert that "settled legal principles" governing private voluntary associations tacitly authorize the Commission to impose sanctions on former party States. But the law of associations - including the very case plaintiffs cite - squarely refutes plaintiffs' position. This Court held in *NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029*,409 U.S. 213 (1972), that "when a member lawfully resigns from the union, its power over him ends." *Id.* at 215. Plaintiffs ignore that passage, and the one they do quote is unexceptional, stating the settled rule that upon withdrawal, an association member remains "subject of course to any financial obligations *due and owing* the group with which he was associated." *Id.* at 216 (emphasis added; quotation omitted). In other words, it is only financial obligations that are already "due and owing" upon resignation that are carried forward. An authority cited by plaintiff below is to the same effect: a "member may lawfully resign at any time and terminate his liability for dues and fees upon payment of all *accrued charges*." 6A N.Y. Jur. 2d Associations & Clubs § 18 (emphasis added).

When North Carolina resigned from the Compact, it had *no* monetary obligations that were already "due and owing" or "accrued." The asserted financial obligation was imposed entirely *after* North Carolina withdrew, as a result of a sanctions inquiry that had not even been initiated by the Commission prior to withdrawal. If monetary sanctions were permissible and validly imposed while North Carolina was a member, it plainly could not escape responsibility for such sanctions simply by withdrawing. But once a State withdraws from the Compact, the Commission's "power over [it] ends." *Granite State*, 409 U.S. at 215.

d. Finally, plaintiffs contend that unless the Commission can impose sanctions on a former member, the Compact would be come a "nullity," because a host State could "escape sanctions for its conduct as a member by withdrawing." Pls. Br. 24-25. The premise again is flawed: withdrawing from the Compact would *not* permit North Carolina to escape liability for its conduct as a member, because withdrawal would not displace the normal exercise of this Court's jurisdiction to adjudicate breach claims arising out of a State's conduct during membership. P.R. 22. Withdrawal simply means that the *Commission itself* may no longer exercise sanctions authority over North Carolina.

Further, plaintiffs' argument that the Compact would be a nullity unless the Commission can sanction former members again fundamentally misunderstands the remedial structure of the Compact, wrongly presuming that the enacting parties believed that there would be no cost whatsoever to the loss of rights

and benefits afforded by Compact membership. *Id.* at 21-22. In fact, the Compact presupposes that membership rights would have substantial value to the party States. Each State is guaranteed access to a proximate disposal facility, and each State is assured that, when it assumes the burden of constructing a facility, it will have a regional monopoly on waste disposal and therefore a reliable stream of revenue to support the facility's operation. Accordingly, there are significant costs to withdrawal that a State must consider. North Carolina, for example, had to weigh the fact that withdrawing would mean it would have no right of access to any regional waste disposal facility *and* that it would never recoup its own investment of some $34 million.

As the Special Master recognized, "the conclusion that party States may withdraw from the Compact and escape further sanctions *by the Commission*" fits hand-in-glove with "the limited nature of the express sanctions available under the Compact." P.R. 31 (emphasis added). Given that the only Commission remedies available under the Compact relate to the suspension of Compact rights, once a State withdraws, it has already "effectively imposed upon itself the most severe sanction available to the Commission - loss of membership as a party State." *Id.* And the State is still exposed to *liability* for any breach of Compact obligations during its membership, since this Court remains available to provide whatever remedy is available and appropriate for such breach.[4]

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[4] The Court should disregard the Solicitor General's ill-considered, unreasoned, and equivocal footnote

The Court should adopt the Special Master's recommendation to dismiss Count I seeking summary enforcement of the sanctions order.

II. THE SPECIAL MASTER CORRECTLY DETERMINED THAT NORTH CAROLINA DID NOT BREACH THE COMPACT.

Plaintiffs next challenge the Special Master's recommendation to grant summary judgment to North Carolina on Count II of the Complaint, which asserts that North Carolina breached the Compact. S.R. 48. Plaintiffs contend that the Commission's

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suggesting that if the Court concludes that the Commission *does* have authority to impose monetary sanctions, then the Court "probably" should hold that the Commission can impose such sanctions even on a *former* party State. U.S. Br. 30 n.9. The Solicitor General's not-quite-argument is that if the Commission has authority to impose a monetary sanction on North Carolina, "North Carolina should not be allowed to avoid that obligation by exercising a unilateral right to withdraw." *Id.* The Solicitor General cannot explain, however, how withdrawal would enable North Carolina to "avoid" an obligation that *did not even exist when North Carolina was a member*. Like plaintiffs, the Solicitor General simply confuses the Commission's own sanctions authority with the authority of this Court to adjudicate and remedy a Compact breach. If North Carolina breached any obligation that *did* exist under the Compact *while it was a member*, then North Carolina cannot avoid the consequences of that breach by withdrawing, because this Court can exercise its jurisdiction to provide an available remedy

determination of breach, made after North Carolina withdrew from the Compact, is entitled to conclusive or strong deference from the Court. Assuming there is any room for the Court adjudicate the issue of breach itself, plaintiffs then assert three ways in which North Carolina breached the Compact. The Special Master correctly rejected these arguments and properly concluded that North Carolina was entitled to summary judgment on plaintiffs' count for breach of the Compact.

A. The Commission's Unilateral Determination Of Breach Is Neither Binding Nor Entitled To Deference.

Plaintiffs assert that Article 7(C) of the Compact vests the Commission with "the sole power to 'judge' whether a party State breached the Compact" (Pls. Br. 26), making the Commission's determination of breach binding on this Court. Alternatively, plaintiffs contend that the Court should review the Commission's judgment under a highly deferential arbitrary-and-capricious standard, analogizing the Commission either to a federal administrative agency or to a private contract arbitrator. As shown below, and as the Special Master and the Solicitor General agree, these arguments are meritless. S.R. 18-20; U.S. Br. 29-30. The Court, in the exercise of its original jurisdiction to resolve disputes among sovereign States, must decide for itself whether North Carolina breached its Compact obligations, and, if so, what remedy is appropriate.

1. The requirement of full, non-deferential review by the Court follows from both the subject matter of the action (i.e., an interstate compact) and the nature of the Court's original jurisdiction. It would be inconsistent with the character of interstate compacts and with the nature of original jurisdiction for the Court to presume itself bound by a "finding" of breach made by a compact entity. This is not a private action between two commercial entities. This is an action between sovereign States - an effort by several States, joined by a non-Compact entity, to seize money from another State's treasury. The Court can resolve that dispute only upon "the utmost circumspection and deliberation," *Iowa v. Illinois*, 151 U.S. 238, 242 (1894), not by summary enforcement of an inherently biased award of money by a compact commission to itself.

The Court recognized essentially this point in *Texas v. New Mexico*, 462 U.S. at 566-71, which involved the Pecos River Compact. New Mexico argued that the Court's role was to do "nothing more than review official actions of the . . . Commission, on the deferential model of judicial review of administrative action by a federal agency," and that the Court thus should countermand the Commission's action only if it was "arbitrary or capricious." *Id.* at 566-67. The Court rejected that argument as inconsistent with the nature of its original jurisdiction, which "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Id.* at 567. If the States and Congress had agreed to make the Pecos River Commission "the exclusive forum for disputes between the States," then

the Court would not exercise its original jurisdiction. *Id.* at 569. But because "the express terms of the Pecos River Compact [did] not constitute the Commission as the sole arbiter of disputes between the States over [their Compact] obligations," the Court was obliged to exercise its original jurisdiction and to resolve the dispute de novo. *Id.* "In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id.* at 569-70.

2. Plaintiffs argue that the Southeast Compact makes the Commission the "exclusive forum" for disputes among Compact members, relying on Article 7(C):

> Each state eligible to become a party state to this compact shall be declared a party state upon enactment of this compact into law by the state and upon payment of the fees required by Article 4(H)(1). The Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

Plaintiffs read this language as "vest[ing] the Commission with the sole power to 'judge' whether a party State breached the Compact," divesting this

Court of authority to do anything other than summarily enforce the Commission's breach determination. Pls. Br. 26. Plaintiffs are wrong for two reasons.

First, even assuming the language means what plaintiffs claim, it logically can apply only to the Commission's exercise of authority *in the sanctions process set forth in Article 7(F).* Plaintiffs cannot seriously contend that the Compact's enactors intended for the Commission to act as a "judge" of party States' alleged breaches without any adjudicative process, hearings, testimony, or examinations. No "judge" acts that way - petty tyrants do. If Article 7(C) means that the Commission is the sole judge of breach, and that this Court therefore lacks authority to makes its own determination, then the authority contemplated in Article 7(C) must be exercised in at least the quasi-judicial sanctions process described in Article 7(F). And the problem for plaintiffs is that the Article 7(F) process was of no legal consequence here, because North Carolina was no longer a party State when the Article 7(F) "hearing" was held. Not only did the Commission's sanctions jurisdiction over North Carolina terminate upon its withdrawal, so too did its power to act as any type of "judge" as to North Carolina's conduct.

Second, as the Solicitor General demonstrates, it is clear from the language and context of Article 7(C) that the Commission's authority as "the judge" only involves issues concerning the eligibility to become a "party state" within the meaning of the Compact. U.S. Br. 29-30. Article 7(C) addresses what an eligible

state must do before it may be declared a party State, and then provides that the Commission is the "judge" of the party States' "qualifications" and whether they comply with the "conditions and requirements of the compact" - *not* "duties" or "obligations" under the Compact. In context, then, the function of the "judge" reference is to grant "to the Commission, rather than to individual party States or prospective member States, ultimate authority to determine whether a prospective member has satisfied the conditions for Compact membership." U.S. Br. 30.

Nothing in "the deep roots in the common law of contracts" (Pls. Br. 27) is to the contrary. The "contract" here does not grant the Commission conclusive authority to decide questions of breach by former parties, so nothing about the contract compels conclusive deference to the Commission's determination.

3. Plaintiffs next contend that if the Compact does not wholly divest this Court of decisionmaking responsibility, then it at least compels the Court to give strong deference to the Commission's breach determination. They invoke the models of administrative agency action and private contract arbitration, but neither is applicable to the "delicate and grave" exercise of original jurisdiction to resolve disputes between sovereign States. *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

a. As the Special Master noted (P.R. 26), this Court rejected the administrative agency model in *Texas v. New Mexico*, at least in cases involving

disputes between the member States themselves, where the Compact did not make the commission the exclusive forum for resolving disputes among members. Under *Texas v. New Mexico*, either the commission is the exclusive forum under the compact, in which case its decision is conclusive and this Court will not even exercise its original jurisdiction, or the commission is not the exclusive forum - as here - in which case this Court adjudicates the case de novo. There is no middle ground of agency-style "deference" in original actions.

Further, as the Solicitor General shows, "an interstate compact entity . . . is not equivalent to a federal agency charged with administering an Act of Congress." U.S. Br. 28. Unlike federal statutes authorizing agency action, the Compact does not "grant the Commission any general authority to construe its terms" or "to determine the scope of permissible sanctions." *Id.* And as the Special Master noted, principles of agency deference assume that Congress "has implicitly assigned policymaking discretion" to an agency, and there is no reason to believe that the Compact's enactor's "sought to assign this type of discretion to the Commission in this case." P.R. 26-27. Full agency deference is appropriate only where Congress has intended for the agency's pronouncements to have "the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), such that they "bind more than the parties to the ruling" and serve as "precedent in later transactions," *id.* at 232, through a procedure that reflects "fairness and deliberation," *id.* at 230. None of those standards is met here. The last is especially significant - it is

impossible to say that the Commission's breach determination reflects a process of "fairness and deliberation," given that the plaintiffs themselves admit that it was reached *without* the benefit of an adjudicative hearing or fair process of any kind,[5] and given that the Commission, unlike a federal agency, is "a party to the case and stands to benefit financially from its own interpretation." P.R. 27.

Old Town Trolley Tours v. Washington Metro. Area Transit Comm'n, 129 F.3d 201 (D.C. Cir. 1997), does not support deference to the Commission's decision. *Old Town Trolley* did not involve a dispute between States; it involved a commission acting as a neutral arbiter for a private dispute arising from a licensing decision. The commission was not simultaneously

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[5] Plaintiffs assert that the Commission made its breach determination "[i]n January 1998, and again, in April 1999 - before North Carolina's withdrawal." Pls. Br. 25-26. They characterize the 1998 event as "an authoritative determination that North Carolina breached the Compact." Pls. Br. 2. Plaintiffs rely on a January 12, 1998 letter conveying "the stated position of the Commission" that North Carolina was in breach (Joint Supp. Fact Br. App. 55), and an April 26, 1999 letter which indicated that "[t]he Commission believes that the State of North Carolina currently stands in violation of the compact law" (Pls. App. 323). Both events long preceded the sanctions hearing. By plaintiffs' own account, then, the Commission exercised its authority as "judge" without *any* quasi-judicial process, hearing, testimony, or examinations - a view of the duties of a "judge" that says much about the Commission's fairness and impartiality.

asserting and adjudicating its own monetary claim, and no concern for the rights and interests of sovereign States was involved.

b. The arbitration model is even more flawed. As noted above, an interstate compact is not the same as a private commercial contract, and the Court's original jurisdiction is not the same as the jurisdiction it exercises to resolve private commercial disputes. *See North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923) ("The jurisdiction and procedure of this Court in controversies between States of the Union differ from those which it pursues in suits between private parties."). In the private commercial arbitration setting, courts give extraordinary deference to the decisions of arbitrators, because federal law and labor policy requires them to do so. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citing 9 U.S.C. § 10); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). There is no federal statute or policy requiring the Court to defer to compact commission decisions.

Furthermore, even if arbitration were an appropriate analogy in the abstract, it would not compel deference to the Commission's sanction here, because the Commission proceeding lacked a key due process feature of arbitration - an impartial decisionmaker - long deemed essential to judicial enforcement of private, quasi-judicial dispute resolution mechanisms. In *Davy's Executors v. Faw*, 11 U.S. 171 (1812), this Court held, in reviewing a decision declining to enforce a private arbitration award, that it is a "proposition[] not to be

controverted" that "judges chosen by the parties themselves as well as those who are constituted by law, ought to be exempt from all imputation of partiality." *Id.* at 174. More recent cases have confirmed that "quasi-judicial" decisionmakers - the type of decisionmaker the Commission claims to be - must adhere to the same requirements of both actual and apparent impartiality that govern true judicial officers. *See Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 618 (1993); *Schweiker v. McClure*, 456 U.S. 188, 196 (1982); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).

The Commission's open and notorious partiality in this matter makes it a far cry from the kind of neutral quasi-judicial decisionmaker whose decisions courts will enforce in commercial settings and in union disciplinary proceedings. S.R. 19 ("the Commission cannot be considered an independent and impartial decisionmaker"). No court would summarily enforce a private commercial arbitration award where a party was the arbitrator. But that is exactly what plaintiffs seek here. The Commission is both a party seeking payment of money and the decisionmaker that awarded itself that money from North Carolina. Certain members of the Commission who voted on the sanctions were the parties who brought the initial sanctions claim. Members of the Commission even testified against North Carolina. And long before even the arguably quasi-judicial sanctions hearing was held, the Commission publicly announced that it had already prejudged North Carolina's guilt. *See supra* at 31 n.5. In short, to the extent private arbitration

provides any kind of useful analogy to this dispute among sovereign States, it is to demonstrate that the sanctions award in this case deserves no deference, because it makes a mockery of the minimum due process requirements required even for private quasi-judicial proceedings.[6]

B. The Undisputed Facts Establish That North Carolina Did Not Breach The Compact.

The Special Master correctly determined that, on the undisputed facts, North Carolina is entitled to summary judgment on plaintiffs' claim that North Carolina breached its obligations under the Compact. To understand the Special Master's ruling, it is important first to understand clearly what conduct plaintiffs allege to have been a breach of the Compact.

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[6] Plaintiffs' insistence that the Commission's decision-making process was fair and the decision unbiased is risible. Plaintiffs assert that "North Carolina assisted in creating the process" used by the Commission, and that "[t]he hearing was presided over by retired Judge VanKann." Pls. Br. 30 n.8. But by their own admission, the Commission decided the breach issue *before* there was any sanctions hearing. And by definition, the parties to an arbitration agree to the process, but that does not obviate the requirement that the process be fair and the decisionmaker be neutral. Nor is it relevant who presided over the sanctions hearing that was finally held: the breach determination had already been made, and Judge VanKann was not a decisionmaker - he did not even have a vote.

Plaintiffs nominally articulate three theories of breach, but two of them are functionally indistinguishable. One theory is that North Carolina breached the Compact by exercising its express right to withdraw from the Compact. Pls. Br. 42. Plaintiffs acknowledge North Carolina's express right to withdraw at any time, but they contend that the right was restricted by an implied covenant of good faith, which North Carolina violated by accepting financial assistance and then withdrawing before licensing a facility. *Id.* ("To be sure, North Carolina could withdraw from the Compact; it simply could not do so in bad faith.").

Plaintiffs' second and third theories focus not on the act of withdrawal, but on North Carolina's conduct *before* withdrawal. Plaintiffs acknowledge that the Compact did not impose an unyielding obligation to license a facility no matter what, but only to "take appropriate steps" to obtain a license for the facility. Article 5(C); *see* Pls. Br. 30-31. Plaintiffs make clear that North Carolina did not breach that obligation at any time before December 19, 1997, when North Carolina suspended operations after being advised it would no longer receive the financial assistance from the Commission it had been receiving since the beginning of the project. Pls. Br. 31, 34. That suspension, plaintiffs contend, was a breach of North Carolina's duty to "take appropriate steps" towards licensing. Plaintiffs' third theory of breach is analytically identical: North Carolina allegedly breached as of December 1997 because at that point North Carolina "repudiated" its contractual obligations by suspending the project. Pls. Br. 48. Indeed,

plaintiffs' own description of their primary "appropriate steps" breach theory asserts that North Carolina "repudiated" the Compact in December 1997. Pls. Br. 34. Obviously, if the suspension was consistent with North Carolina's obligation to take "appropriate steps" towards licensing a facility, it was not a "repudiation" of that obligation, so considering the two theories separately serves no useful analytical purpose.

Accordingly, we address below first the theory that North Carolina breached the Compact by withdrawing, then the theory that North Carolina breached or repudiated its obligation to take "appropriate steps" by suspending operations in December 1997.

1. *North Carolina Did Not Breach The Compact By Exercising Its Express Right To Withdraw.*

a. Article 7(G) confers on party States an express right to withdraw, with no condition or restriction relevant to this case:

> Subject to the provisions of Article 7 Section (H), *any party state may withdraw from the compact*, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the Compact.

Article 7(G) (emphasis added). The right to withdraw is not withheld from host States, or from States that have accepted financial assistance offered by the Commission, or from States that no longer believe the benefits of membership are worth the costs. The Compact imposes only two limitations on the right to withdraw, which operate to confirm that no *other* limitation can fairly be read into the Compact.

The first limitation is stated directly in Article 7(G): if a host State with an existing facility wants to withdraw, it may do so, but it is required to make the facility available to Compact States for four years. *Id.* If the Compact already impliedly barred host States from withdrawing where doing so would undermine the interests of other Compact members, the specific four-year proviso limiting host States' ability to withdraw and preclude access to their facilities would not have been necessary.

The second limitation is even more significant. After North Carolina was designated as a host state, it sought and obtained an amendment to the Compact's withdrawal provision. That amendment added new content to Article 7(H) which expressly terminates Article 7(G)'s unilateral withdrawal right, but only *after* "the commencement of operation of the second host state disposal facility." The amendment, designed to ensure that North Carolina and subsequent host States would have sufficient revenue stream to recoup their investments, thereafter permits withdrawal only upon the unanimous approval of Commission and the consent of Congress.

The addition of Article 7(H)'s express restriction refutes plaintiffs' theory that the Compact "contains implied restrictions on withdrawal." S.R. 32. "If the Commission or other party States had been concerned about the possibility that a host State (such as North Carolina or South Carolina) might withdraw, they could have proposed further amendments to restrict withdrawal." S.R. 33. They did not. Thus, "[a]s the Compact stands . . . North Carolina (like South Carolina before it) was free to withdraw when it chose to do so." *Id.* Reading a limitation on that express, unfettered withdrawal right "would be to grant [plaintiffs], by judicial fiat, contractual protection [they] failed to secure for themselves at the bargaining table." *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. 2004).

Finally, in addition to the Compact's own internal structure, comparison to other contemporaneously enacted compacts again confirms that the Southeast Compact's withdrawal right is unencumbered by unwritten limitations. "Unlike the Southeast Compact, other regional compacts approved by Congress specifically limit a party State's right to withdraw after being selected as a host State to build a disposal facility." S.R. 32. Three compacts delay the effects of host state withdrawal for five years, and one compact even expressly requires a withdrawing host State to pay a "sum" assessed by the Commission "to cover the costs borne by the Commission and remaining party states as a result of that withdrawal" - the very limitation plaintiffs want *added* to this Compact by judicial implication. *Id.* (quoting Midwest Compact, Art.VIII(i), 99 Stat. at 1901). The Southeast

Compact "clearly lacks the features of these other compacts" - especially Midwest Compact - and this Court is "not free to rewrite it." *Texas v. New Mexico*, 462 U.S. at 565.

b. Plaintiffs advance no serious basis for holding that North Carolina breached the Compact by exercising its right to withdraw. Plaintiffs concede North Carolina's express contractual withdrawal right, but they say it was implicitly barred from exercising that right because North Carolina had "sought and obtained almost $80 million to assist it in fulfilling its Compact obligations," while "reaffirm[ing] its commitment to complete a facility." Pls. Br. 42. Those facts do not establish that North Carolina's withdrawal was a breach of any unwritten restrictions for numerous reasons.

First, this Court has never held that sovereign States can be subjected to unwritten legal obligations in the course of their performance under an interstate compact. The opposite rule should obtain - "considerations of federalism counsel caution" when "construing interstate compacts to include implied duties." S.R. 30. "Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding." *United States v. Winstar Corp.*, 518 U.S. 839, 921 (1996) (Scalia, J., concurring). A State's "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Merrion v. Jicarilla Apache*

Tribe, 455 U.S. 130, 148 (1982). The principle is even more salient here, given that the Southeast Compact specifically expresses the party States' intent that "nothing in this compact shall be construed to infringe upon, limit or abridge" their rights as sovereign states. Article 3.

Plaintiffs contend that federalism principles and respect for States' sovereign authority are irrelevant when "States contract with fellow States." Pls. Br. 44. But there is no reason a State should be forced to surrender important rights or interests by judicial implication, merely because the beneficiary of the implication is another State. What is more, the federalism concern involves not just the usurpation of one State's interests (or, here, its Treasury) by other States, but the intrusion on the State's rights by *the judiciary*. Reading interstate compacts strictly according to their terms limits courts' ability to invoke indeterminate equitable principles to impose new, unanticipated obligations and burdens on States committed to interstate compacts. That kind of freewheeling contract-by-judicial-implication approach is what would truly "undermine the stability of Compacts and the predictability of contractual relations." Pls. Br. 43. Enforcing compacts according to their strict terms, and avoiding judicial implication of new terms, is the proper way to promote stability and predictability in interstate compacts. States are the most sophisticated of legal entities, and are perfectly capable of protecting their interests as needed through express contractual statements of rights and obligations - as States did in other

compacts, and as the Southeast Compact States themselves did in Article 7(H).[7]

Second, even assuming interstate compacts are theoretically subject to implied obligations, the terms, history, and context of the Southeast Compact preclude the imposition of unwritten restrictions on its withdrawal right. Unlike express limits on withdrawal in other Compacts, and unlike even the express limit on withdrawal in *this* Compact that arises when Article 7(H) becomes operative, the primary Article 7(G) withdrawal right was explicitly written in *unrestricted* terms. Plaintiffs not only fail to mention Article 7(H) anywhere in their brief, but, incredibly, the version of the Compact appended to their brief does not even include the amended Article 7(H).

Even outside the context of interstate compacts, modern courts are reluctant to recognize unwritten limitations on express contractual rights, with a few increasingly rare exceptions in the employment

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[7] Reading implied obligations into the Southeast Compact would be especially inappropriate, given that three other compacts include express provisions affirmatively establishing a duty of good faith, whereas the Southeast Compact includes no such provision. *See* Central Compact, Art. III(f), 99 Stat. at 1865; Central Midwest Compact, Art. V(a), 99 Stat. at 1886; Midwest Compact Art. V(a), 99 Stat. at 1897. The omission of the provision suggests a conscious determination by the Southeast Compact's enactors that this Compact be construed literally, precluding judicial creativity in constructing new rights and duties.

context. "There can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged." 23 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 63:22 (4th ed. 2003). "[O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). When a contract is "silent," principles of good faith may "fill the gap" in appropriate circumstances - i.e., where there is evidence the parties would have agreed to the term if they had considered it, *see id.* at 442 - but unwritten good faith obligations cannot "block use of terms that actually appear in the contract." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990). As shown above, the Southeast Compact's withdrawal right is expressly established in, and protected by, the Compact's written terms. To prohibit the exercise of that express right by judicial implication is simply to rewrite the contractual term - to provide the parties by fiat what they failed to obtain by negotiation.

Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C. Cir. 1984), is not to the contrary. *Tymshare* involves a private employment contract, and it specifically recognizes that application of the implied good faith covenant depends on the language of the agreement at issue and the expressed or implied intent of the parties. As then-Judge Scalia explained, "the object of our inquiry is whether it was *reasonably understood by the parties* to this contract that there were at least certain purposes for which the expressly conferred

power . . . could not be employed." *Id.* at 1153 (emphasis added). And he acknowledged that "certain express powers . . . *are implicitly absolute* . . . while others are not." *Id.* at 1154 (emphasis added). In this case, all interpretive evidence demonstrates that the Compact's express withdrawal right is absolute.

Third, the implied limit on withdrawal plaintiffs assert is not even a generally applicable, predictable limitation. Their proposed restriction rests entirely on the fact that North Carolina had accepted funds from the Commission while affirming its commitment to build a facility. Pls. Br. 42. Plaintiffs do not contend that North Carolina would have breached if it had exercised its right to withdraw immediately after being named host state, before the Commission began providing the financial assistance the Commission deemed "necessary and appropriate." The implied obligation plaintiffs would read into the Compact is thus tantamount to a special *amendment* - whereas North Carolina was free to withdraw at any time before licensing a facility under the Compact's plain terms, its acceptance of funds created a new contractual obligation not to withdraw without licensing a facility.

The problem is obvious: there was no agreement by the parties that the Commission's provision of assistance was conditioned on North Carolina's promise to license a facility before exercising its contractual right to withdraw. To the contrary, plaintiffs have specifically *disclaimed* the existence of any "supplemental agreement between North Carolina and the Commission that would have limited North

Carolina's right to withdraw in exchange for financial assistance from the Commission." S.R. 21. The parties all agree that the Commission instead "provided assistance merely to facilitate North Carolina's performance under the Compact and neither requested nor expected any additional performance." *Id.* If at any point the Commission had stated that it would provide further assistance only if North Carolina conclusively promised to license a facility and waived its express right to withdraw from the Compact, North Carolina would have flatly rejected the proposal. Plaintiffs cannot now use an implied covenant to retroactively create a binding contractual agreement they never sought or obtained.

Finally, there is no merit to plaintiffs' assertion that enforcing the Article 7(G) withdrawal right by its plain, unrestricted terms would make the Compact "illusory" or "self-defeating." Pls. Br. 47. As already explained, the Compact's operating premise is that membership rights are valuable and withdrawal is costly. The costs to North Carolina indeed were severe: "Plaintiffs do not dispute that North Carolina spent approximately $34 million of its own funds in its efforts to site and license a new facility" - funds North Carolina now will never recoup through an operating facility. S.R. 34. It is thus simply false to accuse North Carolina of "opportunistic conduct" by withdrawing when it did. Pls. Br. 43. Plaintiffs cannot deny that North Carolina spent the Commission's $80 million solely on licensing efforts, or that North Carolina spent $34 million of its own money toward the same end. As the Special Master recognized, "the current record suggests that North

Carolina worked diligently to obtain a license and did not withdraw until it became clear that it would not have the requisite funds to seek and secure a license for the facility." S.R. 33-34. There is nothing opportunistic about cutting losses.[8]

2. *North Carolina Complied With The Obligation To Take "Appropriate Steps" As A Designated Host State.*

Plaintiffs recognize, as they must, that the Compact obligates a designated host State only to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Article 5(C); *see* Pls. Br. 30-31. The Compact "does not impose an absolute obligation on the host State to build a facility." S.R. 20-21. Instead, "the obligation in question is properly construed to be more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost." S.R. 21.

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[8] *Market Street Associates Limited Partnership v. Frey*, 941 F.2d 588 (7th Cir. 1991), does not support plaintiffs' position. The "opportunistic behavior" that "violat[ed] the duty of good faith" in that case occurred if one party to the contract "tried to trick" the other "and succeeded in doing so." *Id.* at 596. Here, North Carolina was always candid with the Commission and the party States that while it was committed to licensing a facility, it could not do so without outside financial assistance.

Plaintiffs assert that North Carolina first breached its "appropriate steps" obligation in December 1997, after North Carolina commenced an orderly shutdown of the project in response to the Commission's pronouncement that financial assistance would no longer be available. Plaintiffs do not contend that North Carolina failed to take "appropriate steps" *prior* to December 1997; rather, their contention is that "by refusing after that time to assume the entire financial burden associated with licensing and building a facility, North Carolina failed to take appropriate steps and breached its obligations under the Compact." S.R. 20; *see* Pls. Br. 2-3 (North Carolina breached when it "ceased licensing activities in December 1997") *id.* at 31 (North Carolina failed to take appropriate steps "as of December 1997"); *id.* at 34 (similar).

The Special Master correctly rejected this theory, relying primarily on the undisputed facts establishing the parties' clear and consistent understanding, from the outset of the Compact, that it would not be "appropriate" for North Carolina to license a facility entirely at its own taxpayers' cost, because external financial assistance was "necessary" to enable North Carolina to complete the siting and licensing process. Given that understanding, continuing the process entirely on its own, without the outside funding recognized by all as necessary, was not an "appropriate step" North Carolina was obliged by the Compact to take. Rather, suspending the project, but preserving records and materials while seeking alternative funding prior to its withdrawal in July 1999, "satisfied its obligation under the Compact to take 'appropriate

steps.'" S.R. 28. Plaintiffs' objections to that conclusion are meritless.

a. As the factual record demonstrates, the parties always understood that, whatever their cost estimations might have been prior to the Compact's enactment, a host State could not realistically be expected to bear the full costs of the licensing process alone. Thus, soon after North Carolina was designated by the Commission in September 1986 to be the host State for the next regional facility, the Commission enacted a resolution establishing the "Host State Assistance Fund," which was intended to assist "with the financial costs and burdens associated with the preliminary planning, the administrative preparation, and other pre-operational costs" of developing a disposal facility. Pls. App. 63-65. The Commission's resolution expressly declared that it was "*appropriate and necessary* to provide financial assistance" to the designated host state. Pls. App. 63 (emphasis added).[9]

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[9] Plaintiffs falsely assert that the Host State Assistance Fund resolution provided only an initial sum of $200,000, and that the "appropriate and necessary" language only "applied to the small amount of 'seed' money provided for by the actual resolution." Pls. Br. 40 n.13. Financial assistance pursuant to the resolution was not limited to $200,000; instead, a total of $1.2 million was provided to North Carolina (Complaint ¶ 20), in annual payments over a six-year period from the Fund. Pls. App. 329. Further, if a mere $200,000 was deemed "appropriate and necessary" to assist the host state, another $79 million would be, if anything, even *more* necessary.

Subsequent express acknowledgments demonstrate the parties' mutual understanding that on-going, substantial financial assistance was "appropriate and necessary." The Commission's institution in 1989 of a "Capacity Assurance Charge" was explicitly intended to generate funds "to support the licensing phase of North Carolina's site development." Pls. App. 71. Financial assistance provided to North Carolina pursuant to the "Capacity Assurance Charge" exceeded $19.7 million. Pls. App. 329. The November 1992 Resolution establishing an access fee on southeastern generators for the period from January 1, 1993 through December 31, 1995, likewise declared that the Commission "*must* take appropriate action to furnish additional funds for use . . . [in] the licensing phase of site development in North Carolina." Def. App. 87a (emphasis added). Over $23.4 million of the financial assistance provided to North Carolina came from these access fees. Pls. App. 329.

Additionally, following receipt of the Commission's first indication that "[a]t some point, Commission funds will no longer be available to North Carolina for site development, and North Carolina will need to make alternative plans" for future project funding (January 5, 1996 ltr, Joint Supp. Fact Br. App. 3), North Carolina responded by outlining its development of a revised work plan designed to provide a reasonable estimate of the time and costs involved in getting to a licensing decision. This notice to the Commission advised that "when the revised work plan is completed, it will be *necessary and appropriate* for the Compact Commission to decide

whether it will provide continued funding for this project." April 8, 1996 ltr, Joint Supp. Fact Br. App. 12 (emphasis added). The Commission did not respond by asserting that financial assistance for a host state was not necessary or appropriate under the Compact, but by adopting a resolution stating "that the Commission 'is willing and able to provide funds to support site development in North Carolina.'" June 20, 1996 ltr, Joint Supp. Fact Br. App. 19. And the Commission thereafter provided millions of dollars of additional financial assistance during 1996 and 1997. Complaint ¶¶ 39-42; Pls. App. 329.

Subsequently, the Commission declared that "[s]ufficient Commission funds are not available to complete development of a . . . disposal site in North Carolina, and a plan is need to secure the necessary funding" (August 29, 1997 ltr, Joint Supp. Fact Br. App. 37), and later notified North Carolina that funding would not be released for work beyond November 30, 1997. But even in the funding termination notice the Commission reiterated that it "remains dedicated to work with the Authority and waste generators to develop a plan to share the cost for site development in North Carolina." December 1, 1997 ltr, Joint Supp. Fact Br. App. 49. And, following North Carolina's December 19, 1997, "orderly shutdown of the project" notification, the Commission *again* stated that it "remains dedicated to work with the Authority to develop a plan to *share the cost* for site development in North Carolina." January 12, 1998 ltr, Joint Supp. Fact Br. App. 55 (emphasis added).

b. The foregoing funding history is essential to understanding what "steps" the parties deemed "appropriate" for North Carolina to "take" in pursuing a license. As the Special Master explained, "the phrase 'appropriate steps,' as used in the Compact, is ambiguous," and "suggests that not *all* steps are required by the Compact." S.R. 22 (emphasis added). A host State, for instance, would not be required under the "appropriate steps" obligation to locate a facility in an urban area if a rural site could not be found. *Id.* And "[c]ost is undoubtedly also relevant in assessing the obligation to take 'appropriate steps'" - a host State obviously would not be expected to license a facility *no matter what the cost*. *Id.* To determine what "cost" expectations were embedded in the ambiguous phrase "appropriate steps," the Special Master turned to the parties "course of performance under the Compact," as set forth above. *Id.* at 23.[10] "When, as here, the contract language is ambiguous, the parties' own course of performance is highly relevant to contract interpretation." *Metro. Area Transit v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006); *see Restatement*

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[10] There is no evidence of any specific cost expectations when the Compact was enacted in 1986. But the goal of the Compact was to have a regional disposal facility ready to operate no later than 1991, Article 4(E)(6), and the record does show that in 1989 the parties expected that the "total of all projected expenditures . . . through the receipt of the license on December 31, 1991 is approximately $21,000,000." Pls. App. 74. The record thus strongly suggests that the eventual costs of the licensing process wildly exceeded the parties' expectations.

(*Second*) *of Contracts* § 202(4) (1981) ("any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement").

The Special Master correctly concluded that, given the longstanding and consistent course of performance under the Compact, North Carolina did not breach or repudiate its obligation to take "appropriate steps" toward licensing a facility when it suspended operations in December 1997, after the Commission cut off "necessary" financial assistance. "If North Carolina's limited financial contributions satisfied its obligation to take 'appropriate steps' prior to 1998," the Special Master explained, "then it is difficult to conclude that its refusal to assume an unlimited financial commitment going forward breached this obligation." S.R. 25-26. As detailed above, after the Compact was enacted, the parties immediately and mutually recognized that a host State could not feasibly bear the siting and licensing costs entirely on its own, and that a "Host State Assistance Fund" would be "necessary" to facilitate the licensing process. To recognize that financial assistance is *necessary* is also to recognize that pursuing a license *without* that assistance is not realistically possible. And if pursuing a license without financial assistance is not realistically possible, then it cannot plausibly be considered an "appropriate step," within the meaning of the Compact, for the host State to pursue licensing without any prospect of obtaining that necessary

assistance.[11] The Special Master therefore properly concluded that North Carolina satisfied its obligation to take "appropriate steps" when it declined to waste substantial additional taxpayer dollars on the "futile" prospect (S.R. 25) of obtaining a license with no outside funding assistance (S.R. 36).

c. The Special Master also recognized that plaintiffs' "appropriate steps" breach theory reduces to an absurd proposition: North Carolina would not have breached the Compact if it had simply withdrawn immediately in December 1997, rather than remaining a member, preserving records and materials, and trying to work out a viable continuing cost-sharing arrangement. S.R. 26-27. As noted above, plaintiffs do not contend that North Carolina breached its duty to take "appropriate steps" at any point *before* December 1997. Until then, plaintiffs concede that it was perfectly appropriate for North Carolina to limit its own financial contributions toward the licensing process. Plaintiffs' complaint is that after North Carolina suspended activities in December 1997, it "failed to take *any* steps, let alone 'appropriate steps,' towards obtaining or issuing a license." Pls. Br. 34.

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[11] As of December 1996, the estimated additional cost of reaching the point where a license could be issued was $34 million, and the best cost estimate of constructing a facility was an additional $75 million. S.R. 18. Of the $34 million needed for licensing, the existing business plan noted that the Commission had available approximately $22 million and assumed that North Carolina would provide $7 million towards efforts necessary to reach the point of licensing issuance. Joint Supp. Fact Br. App. 139.

Even leaving aside the factual error in that claim - North Carolina continue to spend $440,000 a year in record and facilities maintenance (S.R. 27) - the legal problem is that North Carolina was at that point free to withdraw outright from the Compact, as shown above. And if North Carolina would not have breached the Compact by exercising its unfettered withdrawal right in December 1997, it is nonsensical to assert that North Carolina *did* breach the Compact by *remaining* a member, and taking active steps to preserve the prospect of license issuance, including by trying to negotiate different financial assistance measures.

d. Plaintiffs' counter-arguments are unavailing. First, plaintiffs contend that the phrase "appropriate steps" is "not ambiguous," and thus the Special Master erred by relying on the longstanding course of performance to establish the parties' understanding of what cost-sharing burden would be "appropriate." Pls. Br. 32, 35-36. Plaintiffs are wrong. It is hard to imagine a contractual obligation that is *more* ambiguous - more open-ended and less specific - than the duty to take "appropriate steps" toward a goal. *See, e.g., Summers v. Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1136 (8th Cir. 1996) (describing "appropriate" as an "ambiguous term"); *EEOC v. Green*, 76 F.3d 19, 23 n.6 (1st Cir. 1996) (noting "apparent ambiguity" in phrase "appropriate charges"). The parties employed an objectively vague phrase, "appropriate steps," to describe the host State's obligations, which then would be construed in light of

the actual, operational experience of the parties acting under the Compact.[12]

Second, plaintiffs repeatedly assert that the Commission had no contractual *obligation to* provide funds to North Carolina, *see*, Article 4(K) ("[t]he Commission is not responsible for any costs associated with . . . the creation of any facility"), and that North Carolina was the only party with a legal obligation to fund the licensing process. This badly misses the point. It is true that the Commission was under no legal *duty* to provide the funds, but that says nothing about whether the parties believed it would be "appropriate" for North Carolina to fund the process *without* the Commission's voluntary assistance. There is, after all, a reason the Commission volunteered almost $80 million in funds, without any contractual obligation to do so, and without obtaining any contractual commitment in exchange for the funds: the Commission understood from the beginning that the only way North Carolina could realistically undertake the licensing process was with significant outside financial assistance. Absent the $80 million, the

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[12] Plaintiffs' reliance on the Atomic Energy Act and NRC regulations is misplaced. Pls. Br. 32-33. When the parties wanted to define a Compact term by reference to the AEA or NRC regulations, they did so explicitly. *See* Article 2(6.) ("'Low-level radioactive waste' or 'waste'"); Article 2(12.)("Transuranic wastes"). And inasmuch as neither the AEA nor the NRC regulations define or even use the phrase "appropriate steps," *see* AEA, 42 U.S.C. § 2011 *et seq.*; 10 C.F.R. § 61.1 *et seq.*, neither source can give specific content to phrase as used in the Compact.

Commission knew that North Carolina could never obtain the license. If the Commission actually believed that North Carolina could realistically obtain a license entirely on it own - as plaintiffs now contend - then simply handing $80 million to North Carolina without strings attached was a breathtaking abuse of the Commission's own corporate responsibilities.

The question, in short, is not whether the Commission was *required* to fund North Carolina's licensing efforts. It is whether the obligation to take "appropriate steps" required North Carolina to complete the process *without continued external financial assistance*, despite the repeated explicit demonstrations of the parties' mutual recognition that such assistance was "necessary," and that it was *not* "appropriate" to expect North Carolina alone to shoulder the financial burden. The Special Master properly considered the course of performance between the parties to answer the question, and correctly concluded that North Carolina's actions satisfied its obligations under the Compact.[13]

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[13] Likewise, North Carolina's recognition of its own funding obligation (Pls. Br. 36, 38, 40, 50) says nothing about *how much funding* the parties believed would be "appropriate" - or, put differently, what "steps" toward licensing were "appropriate" without *any* additional funding. As noted above, North Carolina was not required to take any and all steps toward licensing no matter what cost - it was only required to take steps the parties deemed "appropriate."

For the same reason, plaintiffs err in emphasizing the North Carolina legislation declaring that the purpose of the Authority was to "site, finance, build" a disposal

e. Plaintiffs' contention that North Carolina "repudiated" its "appropriate step" obligations by suspending operations in December 1997 is legally indistinguishable from their claim that North Carolina breached that obligation by the same conduct, as shown above, *supra* at 35-36, and is wrong for essentially the same reasons.

As demonstrated by the parties' course of performance, North Carolina's position after the December 1997 funding cut-off was identical to the position it had maintained throughout the licensing process: "Soon after being selected as the second host State, North Carolina indicated that it could not bear the full financial burden of siting, licensing, and building a new facility." S.R. 23. North Carolina never deviated from that position.

North Carolina's actions following the December 1997 cessation of financial assistance from the Commission reflected the parties' mutual understanding that licensing without financial assistance was not realistically possible, and therefore

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facility, N.C. Gen. Stat. § 104G-4; *see* Pls. Br. 34. The Authority's purpose *was* partly to finance the process, but never at all costs. Underscoring the point, that same August 1987 legislative enactment included § 104G-6(a)(13), which authorized the Authority to accept "grants of money . . . from a compact commission," and § 104G-17(b), which created a separate account with the State Treasurer for "monies from the Southeast Interstate Low-Level Radioactive Waste Management Compact Commission." Pls. App. 38, 46.

futile to pursue absent such assistance. And North Carolina's actions after December 1997 were "appropriate" based on the established course of conduct by the parties, especially in light of the Commission's expressly restated recognition of the need for a mutual plan to fund the licensing effort in its statements immediately before and after North Carolina's "orderly shutdown" notification. The funding cut-off notification states that "[t]he Commission remains dedicated to work with the Authority and waste generators to develop a plan to share the cost for site development in North Carolina" (December 1, 1997 ltr, Joint Supp. Fact Br. App. 49), and the reaction to North Carolina's "orderly shutdown" notification reiterates that "the Commission remains dedicated to work with the Authority to develop a plan to share the cost for site development in North Carolina in order that North Carolina can fulfill its obligations under the law." January 12, 1998 ltr, Joint Supp. Fact Br. App. 55. In response, North Carolina did not simply withdraw from the Compact, but instead "continued to fund the Authority for almost two more years in the hope that alternative funding could be secured." S.R. 27. It would have been a pointless waste of taxpayers' dollars to continue that funding if North Carolina all along secretly intended never to restart the licensing process. The rational choice for North Carolina, if it never intended to perform, would have been to exercise its unambiguous withdrawal right. The fact that it did not do so until the Commission first cut off all funds conclusively, then also threatened to demand the return of all money North Carolina had *already spent* trying to obtain a license, establishes North Carolina's

commitment to the Compact process, not its repudiation.[14]

III. PLAINTIFFS ARE NOT ENTITLED TO RESTITUTION FOR NORTH CAROLINA'S PURPORTED BREACH OF THE COMPACT.

Plaintiffs claim an entitlement "to restitution of $80 million, plus interest" (Pls. Br. 53) as a remedy for North Carolina's purported breach of contract, asserting that the Commission, "on behalf of the party States," provided financial assistance to North Carolina in reliance upon its "obligation and commitment to the other States to develop and operate a regional facility as required by the Compact." Pls. Br. 52.[15]

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[14] There is no merit to plaintiffs' contention that repudiation is established by North Carolina's "*admission* that it took no steps to license or site a facility after December 19, 1997." Pls. Br. 49; *see* Pls. Br. 11, 31. Again, North Carolina's obligation was only to take "appropriate" steps, and the parties recognized that it was not "appropriate" for a host State to seek a license without financial assistance. North Carolina's "admitted" conduct after December 1997 thus did not repudiate its relevant Compact obligation.

[15] Contrary to plaintiffs' characterization, North Carolina plainly did *not* have a duty to "develop and operate a facility." North Carolina's sole relevant duty was to take "appropriate steps" towards licensing a facility. *See supra* at 45.

This claim is, at best, irrelevant and premature. It presupposes a breach of the Compact which, as shown above, did not occur. Accordingly, there is no reason to consider the restitution remedy on that basis. S.R. 45 (based on conclusion that North Carolina did not breached Compact, "it is not necessary to resolve whether the Plaintiffs would be entitled to restitution of $80 million").

The only question raised by plaintiffs is whether restitution is an appropriate remedy *if* there is a breach. The Court should not decide the issue in the abstract. If it is ever finally determined that North Carolina breached the Compact, the restitution remedy may be considered at that time, but even then the Special Master should address it in the first instance, after conducting any necessary factual inquiries.

If the Court does decide that North Carolina breached the Compact as a matter of law, however, and the Court *also* decides to reach the restitution question in the first instance, the Court should hold that restitution of $80 million is not a legally available remedy under the circumstances. It is axiomatic that restitution is only available to a party that itself conferred a benefit on another party.

> A party's restitution interest is his interest in having restored to him any benefit that he has conferred on the other party. Restitution is, therefore, available to a party only to the extent that he has conferred a benefit on the

> other party. . . . The benefit *must have been conferred by the party claiming restitution.*

Restatement (Second) of Contracts § 370 cmt. a & b (1981) (citation omitted).

As detailed in North Carolina's own Exceptions Brief, *see* NC Br. 41-56, the plaintiff States may not seek restitution of funds provided to North Carolina because all funding assistance came exclusively from the Commission. The States themselves have no cognizable legal interest in the Commission's funds. And because the Commission is not a party to the Compact, it has no claim of breach, and thus cannot claim restitution as a contractual remedy. Nor can the States seek restitution as a remedy for breach on the theory that the Commission was acting as their agent in providing funds to North Carolina. As previously shown, *see* NC Br. 50-56, the Commission was a separate legal entity acting on its own behalf.

The States are the only parties potentially entitled to contract remedies, but they provided no funds and thus cannot claim restitution. "The Commission's funds did not come from the party States. Rather, they were raised through surcharges and fees imposed on waste generators." S.R. 15. While the plaintiff States can assert and pursue a breach of contract claim and seek the recovery of *their own* expectation damages or out-of-pocket losses, they cannot pursue a remedy seeking the recovery of money provided to North Carolina *by the Commission*. It is only the Commission - and not the plaintiff States - that can pursue restitution for financial assistance provided by

the Commission. And that distinct restitution claim by the Commission is, in turn, barred by the Eleventh Amendment and North Carolina's assertion of sovereign immunity, as North Carolina has shown. NC Br. 25-39.

Plaintiffs' reliance on *Mobil Oil Exploration & Producing SE., Inc. v. United States*, 530 U.S. 604 (2000), is misplaced. In that case, this Court held that two oil companies had been deprived of the benefit of their bargain when the government breached lease contracts for the exploration and development of off-shore oil fields, and ruled that the companies were entitled to recover the $158 million in up-front money which they themselves had paid pursuant to the terms of the agreement. *Id.* at 623-24. The contracts at issue involved traditional promisor/promisee relationships in which the breaching party had received money pursuant to the contract *from the non-breaching party*. Basic principles of contract and restitution law entitled the companies to recover on a restitution theory because the parties asserting breach had conferred a monetary benefit on the breaching party. Here, in contrast, there is a disconnect between the only parties in a position to assert a breach of contract claim against North Carolina - the Plaintiff States - and the only party that conferred a financial benefit on North Carolina - the Commission.

Every authority cited by plaintiffs makes clear that restitution is available only to the party that conferred the benefit upon the defendant. Plaintiffs attempt to blur the distinction between the actions of the Commission and the actions of the plaintiff States,

but the distinction is a crucial determinant of which party may pursue restitution (the Commission, but for the Eleventh Amendment), and which may not (the plaintiff States). The doctrine of restitution precludes the plaintiff States from recovering money they did not provide.

CONCLUSION

Plaintiffs' exceptions should be overruled. This Court should adopt the Special Master's recommendation to grant North Carolina's Motion to Dismiss as to Count I of the Bill of Complaint and to grant North Carolina's Motion for Summary Judgment as to Count II.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

* *Counsel of Record*

August 2009

(7)

No. 132, Original

Supreme Court, U.S.
FILED
AUG 10 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to the Preliminary and Second Reports of the Special Master

BRIEF IN REPLY TO NORTH CAROLINA'S EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

TROY KING
ATTORNEY GENERAL
ALABAMA
BILL MCCOLLUM
ATTORNEY GENERAL
FLORIDA
ROBERT E. COOPER JR.
ATTORNEY GENERAL
TENNESSEE
WILLIAM C. MIMS
ATTORNEY GENERAL
VIRGINIA

Counsel for Plaintiffs

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

August 10, 2009

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D C 20002

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, N.C. 27605
(919) 828-2501

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BRIEF IN REPLY TO NORTH CAROLINA'S EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

INTRODUCTION

North Carolina raises two exceptions to the Special Master's reports.

First, it argues that the Southeast Interstate Low-Level Radioactive Waste Management Commission ("the Commission") must be dismissed from this action because its claims are barred by North Carolina's sovereign immunity. But, as the Special Master correctly concluded, the Commission may join the Plaintiff States' original action against North Carolina because it asserts the same claims and seeks the same relief as the States. That is the clear teaching of this Court's decisions in *Arizona* v. *California*, 460 U.S. 605 (1983) and *Maryland* v. *Louisiana*, 451 U.S. 725 (1981). North Carolina's opposing arguments all lack merit.

Second, the Special Master properly deferred any decision on the Plaintiffs' equitable claims, which need only be resolved if the Compact claims are rejected. North Carolina, however, asserts that the equitable claims brought by the States and the Commission should be dismissed as a matter of law because such claims are improper when a contract exists between the parties. It also asserts that the Compact is the sole source of potential liability among the parties. North Carolina is incorrect. First, equitable claims are proper when, as here, they are pursued as alternatives to any contract claims. Second, if this Court finds that the Compact does not provide a judicial remedy for North Carolina's breach, the Court will allow claims for relief based on North

Carolina's wrongs related to the Compact, such as the equitable claims presented here.

This Court should uphold the Special Master's recommendations on these points and overrule North Carolina's exceptions.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR THE COMMISSION'S CLAIMS.

North Carolina urges the Court to analyze this case as though the Commission alone had sued it. But, of course, the States of Alabama, Florida, Tennessee, and Virginia are also Plaintiffs in this original action. This Court has long recognized that when a non-State plaintiff joins States in suing a sister State, sovereign immunity does not bar its participation as long as the non-State plaintiff does not "seek to bring new claims or issues against" the defendant State. *Arizona* v. *California*, 460 U.S. at 614; *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. Here, the claims of the Plaintiff States and the Commission are identical, and the Commission is thus a proper party. This Court need go no further to adopt the Special Master's recommendation.

Even if this Court were to overrule these cases, however, the Commission still should not be dismissed. For purposes of this case, the Commission should be viewed as standing in the shoes of the States that it represents. Thus, its claims are not barred by sovereign immunity, and it is entitled to bring suit against North Carolina.

A. Sovereign Immunity Does Not Bar The Commission's Claims Because The Commission Does Not "Seek To Bring New Claims Or Issues Against" North Carolina.

As the Special Master correctly concluded, this Court's precedent establishes that "a non-State party may join a State or the United States in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." Prelim. Report at 5-6.

In *Arizona* v. *California*, 460 U.S. at 614, an original action, both States opposed intervention by Native American Tribes, asserting that the Tribes' presence in the suit violated their sovereign immunity. This Court rejected that argument, reasoning that "[t]he Tribes do not seek to bring new claims or issues against the states." *Id.* "Therefore," the Court concluded, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* The Court was unanimous on this point. See *id.* at 642 (Brennan, J., concurring in part and dissenting in part) (joining the Court's opinion regarding intervention).

Similarly, in *Maryland* v. *Louisiana*, this Court addressed whether several pipeline companies would be allowed to intervene in an original action brought against Louisiana by several States and the United States. The action challenged a tax that Louisiana had levied on certain uses of natural gas brought into the State. As this Court explained, "those [pipeline] companies ha[d] a direct stake in th[e] controversy," and it therefore allowed the companies to intervene "in the interest of a full exposition of the issues." 451

U.S. at 745 n.21. The Special Master correctly noted that, in *Maryland*, "the pipeline companies . . . 'raised the same constitutional issues as those raised by the plaintiff States.'" Prelim. Report at 7.

Like the Tribes in *Arizona* and the pipeline companies in *Maryland*, the Commission here does not assert any claims against North Carolina that differ from those filed by the States. All Plaintiffs have stated legal claims for violation of the Compact, breach of contract, and other equitable claims and sought restitution and other damages. The Complaint was filed jointly and makes no distinction among the Plaintiffs by claim. See Prelim. Report at 6 ("The Plaintiffs in this case have filed a joint Bill of Complaint and are currently asserting the same claims and seeking the same relief against North Carolina."). No subsequent developments in this action suggest that the claims of the party States and the Commission have somehow diverged. As the Solicitor General explained:

> North Carolina suggests repeatedly that the addition of each new plaintiff creates a distinct 'claim' for Eleventh Amendment purposes, even if all of the plaintiffs assert that the defendant violated the same legal obligation and seek the same remedy. North Carolina cites no support for that proposition, and it is contrary to this Court's unanimous holding in [*Arizona* v. *California*, 460 U.S. 605 (1983)].

U.S. Brief at 14-15 (citation omitted)).

Furthermore, both the Commission and the party States raise breach of Compact claims. When North Carolina left the Compact, after taking $80 million dollars from its Compact partners, it harmed the Compact States as surely as it harmed the Commis-

sion. It deprived all member States of the chance to use those funds to work toward another facility in the Compact States, and it gave North Carolina an $80-million-dollar head start if it later chooses to site a facility for its own purposes. It also deprived States of access to the promised disposal facility, with resulting costs for building additional storage space, lost business opportunities, lost economic development, and increased risk to health, safety, and the environment in six states.

In attempting to undermine the import of this Court's precedent, North Carolina relies principally on *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). As the Special Master explained, these cases are easily distinguishable. See Prelim. Report at 10-13.

In *Pennhurst*, the United States and residents of a state school and hospital jointly sued the institution and various of its officials on both federal- and state-law claims and prevailed on the federal claims. On appeal, this Court ruled that the federal claims were not viable and remanded the case. See 451 U.S. 1 (1981). The court of appeals reaffirmed its prior decision based solely on the state-law claim.

The state-law claim, however, was not available to the United States, but only to the private plaintiffs (the residents of the institution). Thus, this Court again reversed the court of appeals. It explained that a "federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment" and concluded that "neither pendent jurisdiction nor any other basis of jurisdiction may override" a State's sovereign immunity. 465 U.S. at 121. But, critically, nothing in *Pennhurst* suggests that where, as here, an appropri-

ate party (a Plaintiff State) sues a State for breach of federal law, other parties making the same claim (the Commission) must be dismissed from that case. That is why this case is like *Arizona* v. *California* and unlike *Pennhurst*.

Similarly in *Oneida*, several Indian tribes had sued two New York counties in federal court. The counties, in turn, impleaded the State of New York, seeking indemnification. This Court reversed the court of appeals' determination that federal courts could exercise ancillary jurisdiction over the counties' indemnification claim, again explaining that "[t]he Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State." *Oneida*, 470 U.S. at 251 (citing *Pennhurst*, 465 U.S. at 121). In *Oneida*, accordingly, no proper party had sued the State of New York. Here, of course, the Plaintiff States have properly filed claims against North Carolina.

In sum, the private plaintiffs in *Pennhurst* and *Oneida* made claims that were separate and apart from any claims made by a proper party. Here, the Commission has raised neither any claim separate from those of the Plaintiff States nor any claim that is supported only by supplemental jurisdiction. *Pennhurst* and *Oneida* are thus neither analogous nor instructive here.[1] As the Special Master correctly

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[1] The notion that *Pennhurst* somehow overruled or cast doubt on *Arizona* is implausible. *Arizona* was decided in March 1983; *Pennhurst* was decided in January 1984, less than ten months later, by the same five-Justice majority, which does not mention *Arizona*. Nor has any subsequent decision in the *Arizona* case revealed concerns with the Tribes' continuing participation. *See Arizona* v. *California*, 530 U.S. 392, 399 (2000); 547 U.S. 150, 151 (2006).

concluded, those cases "simply underscore the limitation implicit in those decisions. If . . . a State has already asserted an appropriate claim against a State, then permitting a private party with a stake in the outcome to assert the *same* claim does not infringe on the State's Eleventh Amendment immunity." Prelim. Report at 13.

North Carolina next asserts that if this Court's *Arizona* and *Maryland* decisions remain good law, they "reflect[] an improperly narrow conception of the Eleventh Amendment" and "cannot be reconciled" with other decisions of this Court, specifically *Alden* v. *Maine*, 527 U.S. 706 (1999). North Carolina's Exceptions at 35-36. It is unclear whether North Carolina intends to argue that *Arizona* and *Maryland* "have been" or "ought to be" overruled, but in either case, North Carolina's argument is not persuasive.

Neither *Alden* nor any other case purports to overrule either *Arizona* or *Maryland*. The opinions in *Alden* do not even mention these cases. This Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

As noted by the Solicitor General in her *amicus* brief, North Carolina makes no recognizable argument that *Arizona* ought to be overruled. It does not advance any of the usual considerations this Court takes into account when it contemplates the overturning of a long-standing precedent. U.S. Brief at 12-13.

Nor should *Arizona* be overruled. It did not create an unworkable rule. See *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854-55, (1992). There has been no change of factual circumstances to justify a change in the law. *Id.* The decision was not closely divided;

it was unanimous. *Payne* v. *Tennessee*, 501 U.S. 808, 828-29 (1991). And compacts have been drafted with the expectation that a Compact Clause entity, together with member States, would be permitted to bring suit against a breaching State. See *id.* at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."). In short, *Arizona* governs here, as the Special Master found.

Finally, North Carolina contends that the claims of the party States and the Commission are not in fact identical. Specifically, North Carolina maintains that the money delivered to North Carolina belonged to the Commission, and not to the party States, making the claims based on that money different.

Initially, this argument, like the one before it, asks this Court to reject *Arizona*. *Arizona* held that the sovereign immunity question depends on the claims that each party *pleads*, not on the ultimate validity of those claims. Thus, as long as a party does "not seek to bring new claims or issues against the states," its claims do not implicate the Eleventh Amendment. *Arizona*, 460 U.S. at 614.[2] Here, all parties bring claims for breach of contract, breach of Compact, restitution, etc. The elements of the claims are the same for all Plaintiffs. In reality, North Carolina is arguing that the States *are less likely than the Commission to succeed on these identical claims.* North Carolina's Exceptions at 39-55. That is beside the point for purposes of this jurisdictional argument. All Plaintiffs bring the same claims.

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[2] The non-State party's claims need not even be precisely identical, as *Arizona* recognized. 460 U.S. at 612 (noting that the Tribes' motion to intervene made "claims for additional water rights" to reservation lands).

Although North Carolina's assertion about the ownership of the money provided to it is legally irrelevant, it is also wrong. North Carolina's characterization of the money's ownership is inconsistent with the terms of the Compact, and fundamentally misapprehends both the States' interest in the funds held by the Commission and the nature of the relationship between the Commission and the party States.

Fundamentally, the $80 million that North Carolina took belonged to the party States. The money was not transferred to the Commission directly from the State's treasuries; but the States had explicit, legally cognizable interests in the money. First, the Compact expressly defines the money the Commission holds as the money of the party States. Art. 4(H)(2)(b). Second, the Commission is the agent of the party States, and it was in that capacity that the Commission collected and disbursed the funds. The money was thus at all times under the control of, and used at the direction of the party States. It was in all relevant respects the States' money.

In fact, the money came from fees and surcharges imposed on generators that disposed of their waste at the Southeast Compact's regional waste disposal facility in Barnwell County. As such, even though it was gathered through various funding mechanisms, these funds flowed to the Commission pursuant to Article 4(H)(2) of the Compact, which requires "[e]ach state hosting a regional disposal facility [to] annually levy special fees or surcharges on all users of such facility." Although South Carolina, as host State, was responsible for collecting the fees and surcharges and remitting them to the Commission, Art. 4(H)(3), the Compact expressly provides that the total amount collected in fees and surcharges "must represent the

financial commitments of all party states to the Commission," Art. 4(H)(2)(b), regardless of the specific mechanism utilized.[3]

Thus, under the Compact, the money that South Carolina collected in fees and surcharges represented the "financial commitments" of all the party States to the Commission. All the party States, including North Carolina, agreed to this contractual term and it is binding.

If more were needed, the Commission actually collected and disbursed the money in its role as the agent of the party States, which the Compact makes clear. It is well-settled that when the agency requirements are met, an association will be deemed the agent of its members and the property it holds is the property of its principals. See *Smith* v. *NCAA*, 139 F.3d 180, 188 (3d Cir. 1998) (association is agent of its member institutions), *rev'd on other grounds*, 525 U.S. 459 (1999); accord *Bot* v. *Comm'r*, 353 F.3d 595, 600-01 (8th Cir. 2003); *Horner* v. *Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994); *S. Pac. Transp. Co.* v. *Continental Shippers Ass'n*, 642

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[3] As North Carolina points out, the Compact provides several mechanisms for the Commission to initiate the levying and collecting of those fees. North Carolina's Exceptions at 43-44. Regardless of the mechanism the party States used, however, the Compact expressly states that "the total" amount of all "fees or surcharges" levied on "all users of [the regional disposal] facility" "represent the financial commitments of all party states." Art. 4(H)(2) & (2)(b). All of the money the Commission collected was raised by levying fees against those entities that used the facility. Whether the party States collected the money through article 3(B) access fees or out-of-region access fees, article 4(H) is clear: "the *total*" money collected and delivered to the Commission through "fees or surcharges *on all users* of such facilit[ies]" is the money of the party States. Art 4(H) (emphasis added).

F.2d 236, 238 (8th Cir. 1981). Indeed, North Carolina concedes that any money conveyed by the party States' agent may be sought from North Carolina in restitution. North Carolina's Exceptions at 42 (referencing the "black-letter rule that a plaintiff may seek restitution only of moneys paid by the plaintiff itself (directly or *through a proper legal agent*)" (emphasis added)).

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* § 1.01 (2006). As a matter of Compact law, the party States control the Commission. See Art. 4(A) ("The Commission shall consist of two voting members [Commissioners] from each party state to be appointed according to the laws of each state."); Art. 4(B) ("No action of the Commission shall be binding unless a majority of the total membership [Commissioners] cast their vote in the affirmative . . . unless a greater than majority vote is specifically required . . . .").

It is undisputed that the Commission was acting on behalf of the party States when it collected and disbursed the funds. The Commission was acting pursuant to its role under the Compact to "seek to ensure that [North Carolina's] facility [was] licensed and ready to operate as soon as required." Art. 4(E)(6). Specifically, the party States instructed the Commission to collect money in order to aid North Carolina, to raise the funds through particular mechanisms, and to deliver the money to North Carolina. See, *e.g.*, Feb. 9, 1988 Resolution (App. 63-65); Summary De-

scription of Capacity Assurance Charge (App. 71-74); Nov. 15, 1990 Minutes of Commission (App. 97-100).

Under these circumstances, the Commission was plainly the agent of the party States. *Central States Trucking Co.* v. *J.R. Simplot Co.*, 965 F.2d 431 (7th Cir. 1992), illustrates this point. In that case, the Seventh Circuit held that the Perishable Shippers Association ("PSA") was the agent of all of its member companies. The agreement between the member companies and the PSA did not mention agency, but it established a Board of Directors with representatives from the various member companies. The Board was given authority by the PSA's by-laws to control the actions of the PSA, which received money from the various member companies and paid money out to other businesses. *Id.* at 434. The court held that the organization was the agent of the various member companies. *Id.* The relevant inquiry was whether there was an agreement "'by one person to another that the other shall act on his behalf and subject to his control.'" *Id.* at 433 (quoting *S. Pac. Transp.*, 642 F.2d at 238). The agreement between the member companies and the PSA demonstrated this control and therefore created an agency relationship.

The same legal conclusion is warranted here. The Compact establishes that the Commission will act under the control of the Commissioners, who are representatives of the party States. See Art. 4(A) & (B). Further, the Commission is acting for the benefit of the party States when it supports and assists in funding the establishment of a regional facility. Art. 4(E)(6) (Commission was tasked, by the party States, with "seek[ing] to ensure that [North Carolina's] facility [was] licensed and ready to operate as soon as required."). Therefore, when the Commission col-

lected funds from the party States and distributed those funds to North Carolina, it acted as the agent of the party States. Any benefit it conferred as an agent on North Carolina was a benefit conferred by the party States. See *Packet Co.* v. *Clough*, 87 U.S. (20 Wall.) 528, 540 (1874) ("whatever the agent does in the lawful prosecution of the business intrusted to him, is the act of the principal"); *accord* 3 Am. Jur. 2d *Agency* § 2 (2002).[4]

North Carolina contends that the Commission cannot be the agent of the party States (i) because the Compact explicitly states that the Commission is a "separate" "legal entity" and that the "[l]iabilities of the Commission shall not be deemed liabilities of the party states," Art. 4(M)(1), and (ii) because the Com-

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[4] Defendant incorrectly argues that the Commission should be viewed as a corporation and that as shareholders of the "corporation," the party States cannot "seek[ ] restoration of funds belonging to the association (or corporation) itself." North Carolina's Exceptions at 54. But, the party States do not seek restitution of the Commission's funds, they seek restitution of their own funds that were held by their agent, the Commission. And, even if the Commission could somehow be viewed as a corporation and the States its shareholders, when agency principles are met, shareholders are deemed principals and the corporation is their agent. *See, e.g., Comm'r* v. *Bollinger*, 485 U.S. 340, 344-50 (1988) (because agency principles were met, the shareholders were principals and the corporation their agent); *see also Smith*, 139 F.3d at 188 (association is agent of its member institutions). And money held by the agent is the principals' money which the principals may seek through restitution. *See, e.g., Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (money held in agency account and managed by agent is the "private property" of the principal); 5 *Collier on Bankruptcy* ¶ 541.06[1][a] (15th ed. 1999) (In an agency relationship, "the title to the property remains in the . . . principal, and the . . . agent holds the property under the . . . agency for the owner's benefit.").

missioners, not the party States, control the Commission. North Carolina's Exceptions at 51-52. These arguments are incorrect and misunderstand both agency law and the Compact.

First, North Carolina argues that because the Commission and the States are separate legal entities the Commission cannot be the agent of the States. By law, however, an agent is always a legal entity separate and distinct from the principal.[5] *Restatement (Third) of Agency* § 1.01, cmt. *c* ("Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal."). To be the States' agent, the Commission had to be a separate legal entity.

The fact that the Commission is capable of acting on its own behalf – as, for example, when it hires staff or leases office space – does not make it incapable of acting on behalf of the party States. See *id.* § 1.01, cmt. *b* ("[T]he legal consequences of agency may attach to only a portion of the relationship between two persons .... Aspects of an overall relationship may constitute agency and entail its legal consequences while other aspects do not.").

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[5] This Court's reasoning in *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), is not to the contrary. In *Dole*, this Court recognized that even if corporate formalities were applied, an entity could be an agency or instrumentality of a foreign state. *Id.* at 474 ("the statutory language ... grants status as an instrumentality of a foreign state to an entity a 'majority of whose shares or other ownership interest is owned by a foreign state,'" thus indicating that "Congress intended statutory coverage to turn on formal corporate ownership").

North Carolina also argues that the Compact language providing that the Commission's liabilities "shall not be deemed liabilities of the party states," Art. 4(M)(1), precludes the Commission from acting as an agent of the States. This argument is based upon Defendant's erroneous assumption that principals *must* share liability with their agents or no agency relationship exists. This proposition is unsupported by agency law. Agency turns on whether parties manifest assent that one will act on behalf and under the control of another party, not on considerations of liability. *Restatement (Third) of Agency* § 1.01. In fact, it is well-established that certain agency relationships lead to an imputation of liability between the agent and the principal, while other agency relationships do not.[6] The question of vicarious liability is thus irrelevant to whether the States intended the Commission to have power to act as their agent.[7]

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[6] For example, under the doctrine of *respondeat superior*, an employer is vicariously liable for torts committed by his employees (who are generally agents of their employer) acting within the scope of their employment. *See Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 756 (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment."). By contrast, an employer is not vicariously liable for torts committed by independent contractors (who are also often agents of their employers). *See Restatement (Second) of Torts* § 409 (1965); *id* at cmt. *a* ("an agent may be either an independent contractor or a servant"); *Wilson* v. *Good Humor Corp.*, 757 F.2d 1293, 1301 (D.C. Cir. 1985) ("[A]n employer of an independent contractor is not liable for [torts] of the contractor.").

[7] Defendant also claims that "the notion of an agent possessing punitive powers over its principal is completely inconsistent with basic tenets of a principal/agent relationship." North Carolina's Exceptions at 51. Defendant fails to quote any of these

Second, North Carolina argues that the Commission is not the agent of the party States because it is not controlled by those States. However, as discussed previously at 11, the Commission can only act by a majority or super-majority vote of the Commissioners, who are representatives of the party States. See Art. 4(A) & (B). The Commissioners are "appointed" by each State, "according to the laws of each state," Art. 4(A), and act under the direction of their respective governors and other state leaders. In addition, the record establishes that the Commissioners represented the party States. See, *e.g.*, M. Mobley, Tennessee Commissioner, Deposition Tr. at 250 (App. 561) ("I'm representing the state of Tennessee down the line. I mean, I could care less what the Commis-

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"basic tenets" and, indeed, agents possessing punitive powers over their principals is both consistent with agency law and a common occurrence. Because agency is determined by assent and control, if principals agree that their agent shall possess punitive powers as to them, as the Compact does here, the agent has such powers. *See* Art. 7(F) (party States confer on Commission authority to sanction). In addition, an agent of multiple principals regularly has both fiduciary duties to each principal and is authorized, by consent of the principals, to take punitive action against a principal. For instance, arbitrators are considered agents of the parties before them, *George Watts & Son, Inc.* v. *Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001); *Farulla* v. *Ralph A. Freundlich, Inc.*, 279 N.Y.S. 228, 241 (N.Y. Sup. Ct. 1935) ("Arbitrators are agents of both parties. Hence, their acts are considered as the acts of the parties themselves; and a balance found by the arbitrator is considered as a balance struck by the parties on an account stated by themselves.") (quoting *Hays* v. *Hays*, 23 Wend. 363, 366-67 (N.Y. 1840)), and are routinely empowered by arbitration agreements to use punitive powers over their principals, *see, e.g., Int'l Ass'n of Heat & Frost Insulators, Local Union 34* v. *Gen. Pipe Covering, Inc.*, 792 F.2d 96, 100 (8th Cir. 1986) (arbitrator given power to "impose fines or other penalties" for violations of an agreement) (internal quotation marks omitted).

sion wants because the Commission is nothing but each commissioner sitting down and saying, 'I'm representing this state and I'm here to do the deal.'"); K. Whatley, Alabama Commissioner, Deposition Tr. at 154 (App. 565); H. Wheary, Virginia Commissioner, Deposition Tr. at 227-28 (App. 569). Mr. Setser, the deponent on behalf of the Commission, also testified that "the only thing that gives life to the Commission are the party states, so the Commission was acting as the agent and suing on behalf of the party states." Setser Deposition Tr. 101 (Supp. App. 500).

It is clear that the Commission acted under the control of the party States. See *Cent. States Trucking*, 965 F.2d at 434 (Association's "members had the ability to control the association," via a "Board . . . made up of representatives of its members" and therefore association was members' agent).

North Carolina attempts to avoid this conclusion by arguing that because the Compact requires a majority vote, no *single* State controls the Commission. North Carolina's Exceptions at 52-53. But, an entity controlled by multiple parties may nonetheless be an agent. See, *e.g.*, *Restatement (Third) of Agency* § 3.16 ("Two or more persons may as coprincipals appoint an agent to act for them in the same transaction or matter."). And, an agent can be controlled by its principals even when the principals direct the agent through a non-unanimous decision process.[8] The

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[8] For instance, in partnerships, each partner is a principal and agent. *See Latta* v. *Kilbourn*, 150 U.S. 524, 543 (1893) ("By the well-settled law of partnership each member of the firm is both a principal and an agent."); *Grassmueck* v *Am. Shorthorn Ass'n*, 402 F.3d 833, 841 (8th Cir. 2005) (same). When the requisite number of the partners vote for an action, as set-out by an agreement, the partnership must comply. *See, e.g., Trump* v.

relevant inquiry is whether, when the principals direct – through whatever form they have elected – the agent must obey. Here the Commission must abide by the Compact, which requires that when a majority (or, for certain decisions, a super-majority) of party State Commissioners vote for an action, the agent-Commission must comply.[9]

Because agency principles are met here, the Commission is the agent of the party States; and as North Carolina recognizes, a party may seek restitution for money conveyed by its agent. North Carolina's Exceptions at 42. The party States therefore, may properly seek restitution of the $80 million conveyed by the Commission.

Refco Props., Inc., 605 N.Y.S.2d 248 (N.Y. App. Div. 1993) (partnership agreement requirement that 65% of partners agree to management decisions); *Heritage Co. of Massena* v. *La Valle*, 605 N.Y.S 2d 613, 614 (N.Y. App. Div. 1993) (partnership agreement provision requiring affirmative vote of 75% of partnership interests).

[9] North Carolina also argues that the "resolutions" in question did not "state[] or suggest[] . . . that the Commission was providing these funds to North Carolina in an agency capacity." North Carolina's Exceptions at 52. This omission is not material; as a matter of law, "[w]hether a relationship is characterized as an agency in an agreement between parties . . . is not controlling." *Restatement (Third) of Agency* § 1.02. Indeed, "[t]he relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act." *Restatement (Second) of Agency* § 1, cmt. *a* (1958); *see also Interocean Shipping Co.* v. *Nat'l Shipping & Trading Corp.*, 523 F.2d 527, 537 (2d Cir. 1975) ("Agency is a legal concept which depends on the manifest conduct of the parties, not on their intentions or beliefs as to what they have done."). The Commission was under the control of the party States and carried out its role on behalf of the party States. Thus, the Commission acted as the agent of the party States when it collected the funds at issue.

There is no difference between the Commission's claims and those of the party States. North Carolina's attempt to find such a difference in the parties' relationships to the funds provided to North Carolina is both legally irrelevant and wrong – all Plaintiffs have the same causes of action and seek the same remedies from North Carolina.

In sum, under this Court's established precedent, the Commission is a proper party because its claims are identical to those of the plaintiff States.

B. North Carolina May Not Assert Sovereign Immunity Against The Commission.

The Commission is not bringing independent claims against North Carolina. If this Court agrees, it need not address the Commission's alternative argument that its claims against North Carolina are not barred by sovereign immunity, for two reasons. First, a Compact Clause entity can sue a member State. It does not offend a State's sovereign immunity to defend an original action brought before this Court by an interstate compact commission that represents its sovereign state members.

Second, North Carolina waived its sovereign immunity as against the Commission when it signed the Southeast Compact, which includes a provision allowing the Commission to stand in the shoes of its party States and bring suit on their behalf. Art. 4(E)(10) (authorizing the Commission "[t]o act or appear on behalf of any party state or states . . . before . . . any court of law").

1. Compact Clause entities are not generally precluded from suing States.

North Carolina argues that "a Compact Clause entity is not a State for 'Eleventh Amendment pur-

poses,'" North Carolina's Exceptions at 28-29 (citing *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-02 (1979)). From this premise, North Carolina argues that the Commission cannot sue a State. There are several problems with this argument.

First, neither *Hess* nor *Lake Country* involved a Compact Clause entity bringing suit against a State. In fact, neither case included a State party. Both cases dealt solely with the question of whether a Compact Clause entity itself could assert sovereign immunity – an issue not relevant here. See *Hess*, 513 U.S. at 39 (Compact Clause entity was "not entitled to Eleventh Amendment immunity from suit in federal court"); *Lake County*, 440 U.S. at 402 (same). Nothing in the analysis of these cases suggests that Compact Clause entities cannot sue States, particularly where as here the Compact provides that the entity stands in the shoes of its sovereign member States.

Second, neither case purported to establish a general rule that Compact Clause entities do not share in their member States' sovereign immunity. Instead, both cases relied on fact-specific inquiries to determine whether the specific Compact Clause entities at issue could assert sovereign immunity. The Commission here is unlike the compact entities in *Hess* and *Lake County*. It is composed solely of members representing States, rather than smaller units of government or private parties. Compare Art. 4(A), with *Hess*, 513 U.S. at 44.[10]

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[10] Moreover, assuming *Hess* and *Lake Country* provide the relevant legal framework for determining whether the Commission stands in for a member State for these purposes, North

More generally, this Court has suggested that original actions are "fundamentally different," and less amenable to the sovereign immunity defense because under the States "*cannot* form an interstate compact without" congressional consent. *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); see U.S. Const. art. I, § 10, cl. 3. It logically follows from the nature of an interstate Compact, that a Compact Clause entity should be able to sue a State on behalf of a sister State in order to enforce the underlying compact. In fact, the preeminent federal practice treatise describes it as a "commonsense proposition that the Eleventh Amendment does not bar an interstate commission created by Congress from enforcing the terms of an interstate compact [and] bringing suit against a signatory state in federal court." 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3524, at 251 (3d ed. 2008).

The only case to have addressed the question in detail involved the Central Interstate Low-Level Radioactive Waste Compact. See *Entergy Ark., Inc.* v. *Nebraska*, 68 F. Supp. 2d 1093, 1100 (D. Neb. 1999), *aff'd in relevant part and rev'd in part*, 241 F.3d 979 (8th Cir. 2001). Surveying the origins of the Compact Clause and the history of its use, that court concluded that the State defendant was not shielded by sovereign immunity. *Id.* The court reasoned that a compact allows a State to act in an area in which it would otherwise be under a constitutional prohibition, so

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Carolina does not apply the factors utilized in those cases, let alone show that the Commission does not qualify. Both *Hess* and *Lake Country* relied on myriad factors – board composition, funding, traditional local control of the regulated area – in determining that the entities at issue did not enjoy sovereign immunity. *See Hess*, 513 U.S. at 44-51; *Lake Country*, 440 U.S. at 401-02.

that when Congress authorizes a compact, it gives States a "'gratuity.'" *Id.* at 1099; see *Coll. Sav.*, 527 U.S. at 686. Consequently, Congress has the power to demand that States cede their immunity in the relevant sphere:

> When the States engage in activities not specifically restricted by the Constitution, they generally enjoy Eleventh Amendment immunity. However, if they enter into an arena from which they were, at the Founding, specifically barred, then quite different rules apply. Those rules come with the consent ("gratuity" in the words of Justice Scalia) of Congress. In that circumstance, the States must accept the controls placed upon them by Congress. Therefore, in a case involving a suit brought by a Compact Clause entity specifically authorized to sue a signatory state, the Eleventh Amendment is not applicable, since, at the Founding, the state had no right whatever to pursue the object of the compact. Simply put, a signatory state has no immunity from suit by a Compact Clause creation because that state had no sovereignty (power) over the enforcement mechanism chosen by Congress.

Entergy Ark., 68 F. Supp. 2d at 1099. Put differently, the States had sovereign immunity from suit before entering the United States, at which point they impliedly consented to suit by the Nation they had joined. *Monaco* v. *Mississippi*, 292 U.S. 313, 328-29 (1934). Similarly, when the member States entered the Southeast Compact, they impliedly consented to suit by the Commission created by that Compact.

As *Hess* makes plain, a Compact's status as a hybrid of state and federal systems makes it unique,

and uniquely associated with States, the federal government, and federal courts:

> Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entity's founders. Nor is the integrity of the compacting States compromised when the Compact Clause entity is sued in federal court. *As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations.* Again, the federal tribunal cannot be regarded as alien in this cooperative, trigovernmental arrangement.

Hess, 513 U.S. at 41-42 (emphasis added) (footnote omitted). A compacting State cannot complain that its dignity and integrity are compromised by a suit in the Supreme Court of the United States by a duly-authorized representative of its sister States to which it made – and failed to fulfill – contractual commitments.

2. North Carolina consented to suit by the Commission.

In the alternative, the text of the Southeast Compact is best read to provide that North Carolina waived any immunity it allegedly enjoyed. Under the Southeast Compact, the Commission is authorized upon written request of the commissioners of a State or States "[t]o act or appear on behalf of any party state or states . . . before . . . any court of law." Art. 4(E)(10). The Commission received such a request from the Commissioners of the States of Alabama, Florida, Tennessee, and Virginia. Consequently, the

Commission was authorized by those States to represent them in this Court.

This language is even more clearly viewed as a waiver when read in conjunction with the party States' grant to the Commission of punitive powers over the party States. See Art. 7(F) ("Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state."). In light of Article 7(F), any State signing the Compact would have understood that Article 4(E)(10) contemplates that the Commission might file suit against a party State in certain circumstances, including those presented in this action.

The Eighth Circuit addressed an analogous argument during the *Entergy* litigation and concluded that Nebraska had waived any immunity:

> The language in Article IV.e supports the Commission's argument that by entering into the Compact, Nebraska consented to action by the Commission to enforce the Compact in federal court: "[t]he Commission may initiate any proceedings or appear as an intervenor or party in interest before any court of law, or any Federal, state or local agency board or Commission that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact." We conclude that by entering into the Compact, Nebraska waived its immunity from suit in federal court by the Commission to enforce its contractual obligations.

Entergy Ark., Inc. v. *Nebraska*, 210 F.3d 887, 897 (8th Cir. 2000). As the panel explained, "the Compact is a

Congressionally sanctioned agreement which authorizes, and indeed requires, the Commission to enforce the obligations it imposes upon party states." *Id.*

This analysis applies to the Compact text at issue here. North Carolina waived its sovereign immunity from suit by the Commission when it ratified the Southeast Compact and vested the Commission with the authority to represent member states in "any court of law." Art. 4(E)(10). The States entering into this Compact would have known that the Commission would be able to enforce the commitments of the member States under the Compact.

* * * *

In sum, the Commission is an appropriate party because it does not bring any claims separate from those brought by the Plaintiff States. This Court need go no further to deny North Carolina's exception to the Special Master's recommendation that this Court find that the Commission is a proper Plaintiff. If the Court decides, however, that the Commission's claims might be somehow different from those of the States, it nonetheless should not dismiss the Commission. North Carolina is not entitled to sovereign immunity from the Commission's claims here.

II. THIS COURT MAY HOLD NORTH CAROLINA LIABLE FOR UNJUST ENRICHMENT, PROMISSORY ESTOPPEL, AND MONEY HAD AND RECEIVED.

North Carolina's second exception addresses Plaintiffs' three equitable causes of action for unjust enrichment, promissory estoppel, and money had and received. In the Special Master's Second Report, he correctly concluded that any determination of these claims is "premature because several factual and

legal questions remain to be decided." Second Report at 44.

Plaintiffs assert the equitable claims only in the alternative, to be pursued if this Court decides against Plaintiffs on the breach of Compact claims. But North Carolina argues that the equitable claims can be dismissed now, as a matter of law, both because such claims are improper when a contract exists between the parties and because the Compact is the sole source of liability between the parties. North Carolina is incorrect on both points. First, equitable claims are proper when sought as an alternative to contract claims, as is the case here. Second, when a Compact does not provide a judicial remedy, the Court allows claims, such as equitable claims, that are related to the Compact.

North Carolina first argues that Plaintiffs' equitable claims should be dismissed because "'there can be no claim for unjust enrichment when an express contract exists between the parties.'" North Carolina's Exceptions at 58 (quoting *Albrecht* v. *Comm. on Employee Benefits*, 357 F.3d 62, 69 (D.C. Cir. 2004)). Because Plaintiffs seek equitable remedies solely as an alternative to their contract remedies, North Carolina's repetition of the common law rule is beside the point. Plaintiffs are not arguing that they are entitled to equitable remedies *in addition* to their contractual remedies, but that their equitable claims arise if this Court determines there are no enforceable contractual claims. And, the law is clear that equitable claims, such as unjust enrichment, are available as alternatives to a claim for breach of contract. 26 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 68:1, at 5 (4th ed. 2003) ("recovery based on unjust enrichment [is] allowed by the courts as [an] alternative remed[y] to

an action for damages for breach of contract"); see also *id.* § 68:5, at 58 ("Where the plaintiff has no alternative right on an enforceable contract, the basis of the plaintiff's recovery is the unjust enrichment of the defendant.").

The opinion that North Carolina quotes, *Albrecht* v. *Committee on Employee Benefits*, 357 F.3d 62, 69 (D.C. Cir. 2004), does not hold otherwise. In *Albrecht*, the court rejected appellant's claim because it "turn[ed] *entirely* on the terms of a contract." *Id.* (emphasis in original); see *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 509 (1959) ("in the federal courts equity has always acted only when legal remedies were inadequate"). Here, in contrast, it is undisputed that $80 million was conveyed to North Carolina in reliance on the contract, not pursuant to an express term of the Compact. It is also undisputed that the Compact provides that the "Commission is not responsible for any costs associated with . . . the creation of any facility." Art. 4(K)(1). If this Court finds that the Plaintiffs are not entitled to contract remedies, Plaintiffs will be entitled to equitable remedies for providing $80 million to North Carolina in reliance on the Compact. See *Klein* v. *Arkoma Prod. Co.*, 73 F.3d 779, 786 (8th Cir. 1996) ("Normally, when an express contract exists between the parties, unjust enrichment is not available as a means of recovery. However, when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice.") (citation omitted).

Second, North Carolina argues that the party States' equitable claims cannot survive because the Compact is the "sole and exclusive source of North Carolina's obligations to the other party States." North Carolina's Exceptions at 59. This Court's deci-

sion in *Texas* v. *New Mexico*, 462 U.S. 554 (1983) ("*Texas I*") demonstrates that North Carolina is wrong. There this Court stated: "In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id.* at 569-70.[11] Thus, when this original action returned to the Court in *Texas* v. *New Mexico*, 482 U.S. 124 (1987) ("*Texas II*"), this Court held that money damages were not foreclosed even where the Compact did not expressly allow for them. *Id.* at 130-31. If this Court finds that the party States have no express contract claim for relief for breach of contract, North Carolina argues that then there can be no relief of any kind for its wrongs related to the Compact. But this is the exact outcome *Texas I and Texas II* preclude – the Court awarded money damages that the compact did not expressly provide.

North Carolina does not point to any "indication" that this Compact forecloses judicial relief not specified in the Compact. North Carolina argues that because the Compact states that it is the "instrument and framework" for a joint disposal effort, it must be the "sole legal 'instrument and framework.'" North Carolina's Exceptions at 57 (quoting Art. 1). But it is

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[11] If North Carolina is arguing that because the parties to the Compact are sovereigns, the Compact is the sole source of their rights and obligations, North Carolina is incorrect. States do not enjoy sovereign immunity as to each other, *see, e.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 182 n.9 (1982), and thus must abide by principles of common law, just like any other party in a contract dispute. *Cf. Franconia Assocs.* v. *United States*, 536 U.S. 129, 141 (2002) ("Once the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity.").

North Carolina that is adding the words "sole legal" before the words "instrument and framework"; the Compact does not so state. The Compact does not preclude the Plaintiff States from seeking relief not expressly provided in its terms for wrongs related to the Compact.

North Carolina also cites the Compact provision that reserves each States' rights as to the others, asserting that this means that the Compact is "explicit" that its obligations "are the sum total of each States' obligations to the others." *Id.* Compact Article 3 states simply that "[t]he rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit, or abridge those rights." Art. 3. North Carolina has no sovereign prerogative to prevent other States in the Compact from bringing equitable claims against it. States do not enjoy sovereign immunity as to each other. See *South Dakota* v. *North Carolina*, 192 U.S. 286, 315 (1904). In all events, Article 3 preserves State rights, but does not authorize States to escape their legal obligations to sister States under the Compact or in equity.[12]

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[12] The Compact *does* contain one "explicit provision" that judicial relief is precluded. *Texas I*, 462 U.S. at 569-70. The Compact is clear that "[t]he Commission *is the judge* of the . . [party States'] compliance with the conditions and requirements of this compact." Art. 7(C) (emphasis added). Thus the Commission is given the exclusive power to determine the party States' compliance with the terms of the Compact. *See, e.g., Texas I*, 462 U.S. at 569 ("If it were clear that the Pecos River Commission was intended to be the exclusive forum for disputes between States, then we would withdraw."). However, beyond that determination, the Compact allows courts to determine the applicable remedy, as well as any claims in equity related to the Compact.

Plaintiffs' equitable claims are alternative claims. Thus, if this Court sustains Plaintiffs' exceptions and allows Plaintiffs' contract claims, it will not need to decide the equitable claims. Moreover, as the Special Master correctly determined, the Plaintiffs' equitable claims rest on legal and factual determinations that he has not made, and they cannot be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, North Carolina's exceptions should be overruled.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

BILL MCCOLLUM
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
STATE OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

ROBERT E. COOPER JR.
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

WILLIAM C. MIMS
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
(804) 786-2071

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, NC 27605
(919) 828-2501

Counsel for Plaintiffs

August 10, 2009

* Counsel of Record

Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

No. 132, ORIGINAL

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary Report and the Second Report of the Special Master

THE STATE OF NORTH CAROLINA'S SUR-REPLY BRIEF

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

September 2009

**Counsel of Record*

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SECONDARY SOURCES

Bromberg & Ribstein on Partnership § 1.03(c)(3) 7

Fletcher Cyclopedia of the Law of Private Corporations § 5939 9

Williston & Lord, *A Treatise on the Law of Contracts* § 68:5 (4th ed. 2003) 26

59A Am. Jur. 2d *Partnership* § 448 (2003) 7

59A Am. Jur. 2d *Partnership* § 907 (2003) 7, 8

THE STATE OF NORTH CAROLINA'S SUR-REPLY BRIEF

I. NORTH CAROLINA HAS SOVEREIGN IMMUNITY AGAINST THE COMMISSION'S CLAIMS.

The State of North Carolina moved to dismiss the claims of the Commission on the ground that the Commission's claims are barred by the Eleventh Amendment and by the constitutional and common law principles of sovereign immunity embodied in that Amendment. In response, the Special Master -- following the analysis proposed by the Solicitor General -- held that a non-State party may overcome a State's sovereign immunity from suit in federal court only if two conditions are satisfied: (1) the State is already being sued by another plaintiff against whom the State cannot assert sovereign immunity, and (2) "the non-State party asserts the same claims and seeks the same relief" as the proper plaintiff. P.R. 6. Concluding that it still remains uncertain whether the Commission is asserting the same claims as the plaintiff States, the Special Master recommended rejection of North Carolina's motion at this time.

The Special Master's recommendation is incorrect for two reasons. First, the Commission's claims are *not* identical to those asserted by the plaintiff States, and thus they are barred by the principle applied by the Special Master. Second, recent decisions of this Court confirm that a State is conclusively entitled to assert sovereign immunity against claims by a non-State entity, even if the

non-State entity is asserting the same claims as other, appropriate plaintiffs.

A. The Commission's Claims Are Distinct From The States' Claims.

The Special Master's recommended ruling tracks the argument of the United States that under this Court's precedents, a non-State entity such as the Commission can join a suit against a State by other States only if the non-State entity's claims are identical to those being asserted by the States. Those precedents rest on the premise that once a claim is properly asserted against a State, it does not enlarge the judicial power of the Court if another party joins the case asserting the same claim. *See* U.S. Br. 16 ("the State's sovereign immunity 'is not compromised' by the participation of an additional party in the suit with respect to that same claim"). But if the non-State entity does *not* assert the same claim, then it cannot overcome the State's sovereign immunity from suit. If it were otherwise, for example, a private plaintiff could join a Department of Labor injunctive action against Alabama under the ADEA, and then pursue his own private monetary damages recovery against the State.

That principle requires dismissal of the Commission as a party here, because it is now clear the Commission is asserting a claim for monetary recovery -- restitution -- that is not available to the States either factually or as a matter of law. Plaintiffs' argument to the contrary is that the Commission and the States are, in fact, asserting the

same claim because the Commission's claim for restitution is actually the States' own claim for restitution. According to plaintiffs, the Commission's money belongs to the States individually, and the Commission is merely acting as the States' agent in holding and disbursing the States' funds. Pls. Reply Br. 9 ($80 million in financial assistance provided by Commission to North Carolina "belonged to the party States" and "was in all relevant respects the States' money"); *id.* at 13 n.4 ("the party States do not seek restitution of the Commission's funds, they seek restitution of their own funds that were held by their agent, the Commission"). That argument is manifestly wrong.

To start, the proposition that the States have an independent legal entitlement to restitution -- an entitlement on which the Commission is merely piggy-backing -- is directly contrary to the position the Commission advanced in No. 131, Original, and even to plaintiffs' own statements in this case. In No. 131, Original, the Commission insisted -- correctly -- that "only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it." Comm. Supp. Br., No. 131, Orig., at 6; *see id.* (emphasizing the "disconnect between the relief that the States and the Commission can obtain"); *id.* (distinguishing between "the States' great interest in the enforcement of the Commission's sanction, and the more minor relief that they can seek individually"); *id.* at 7 (action by one or more individual States "would not ... provide the Commission, or its member States, with an

adequate remedy"); *id.* at 8 ("there is no significant monetary recovery available to th[e] State[s] from this Court.").[1] The United States agreed: "The Commission is not suing North Carolina to recoup funds that are owed to the other party States," but instead was acting in its own right. U.S. Br. No. 131, Orig., at 17. And even in this case, Plaintiffs have openly conceded that "no State claims 'independent entitlement' to the restitution at issue here." Pls. Opp. MTD 6 n.1. But if the States themselves have no restitution claim they can assert independently, then it is impossible to say the Commission's restitution claim is the same as the States' (nonexistent) claim.

Plaintiffs' theory that the Commission is merely asserting a restitution claim that otherwise could be asserted independently by the States rests on one provision of the Compact, and on general agency principles. Neither supports plaintiffs' position.

1. *The Compact's "Financial Commitments" Provision Limits Liabilities And Does Not Create Assets*

Plaintiffs rely heavily on Article 4(H)(2)(b), which provides that fees and surcharges imposed on private waste generators using a regional disposal

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[1] Plaintiffs previously have noted that the States themselves were not parties to No. 131, Original, but if the Commission was acting as the States' agent -- as the States here contend -- then they are as bound by the Commission's statements as if the States themselves had made them.

facility "must represent the financial commitments of all party states to the Commission." According to plaintiffs, this provision "expressly defines the money the Commission holds as the money of the party States." Pls. Reply Br. 9.

Plaintiffs misread Article 4(H)(2)(b). The provision plainly *limits the monetary liabilities* of the member States to the Commission; it does not *create monetary assets* for them. Absent this provision, the Commission might at some future time enact a resolution requiring additional financial commitments from the member States -- like "capital contributions" by partners to a partnership. Article 4(H)(2)(b) precludes the Commission from doing so. The provision thus both establishes and limits each State's financial responsibility to the Commission: regardless of future budgetary needs, each State's obligations are deemed legally satisfied by the fees and surcharges imposed on private generators using the regional disposal facility, ensuring that no further taxpayer money would be taken from the member States' treasuries to fund the Commission's budget.[2]

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[2] Plaintiffs falsely state at one point that "the Commission collected funds *from the party States* and distributed those funds to North Carolina" Pls. Reply Br. 12-13 (emphasis added). Funds from the party States formed no part of the financial assistance provided to North Carolina. In fact, the Commission's funds were exclusively "raised through surcharges and fees imposed on waste generators who used the Barnwell facility in South Carolina." S.R. 15. *See also id.* at 42 ("It is undisputed

2. *General Agency Principles Do Not Provide The States An Independent Basis For Seeking Restitution Of The Commission's Funds*

Plaintiffs next argue that money disbursed by the Commission actually belonged directly to the States as a matter of basic agency law. Plaintiffs' position is that because the Commission acts as the agent of the States for some purposes, money belonging to the Commission necessarily belongs to the States, and thus each State is entitled to pursue a claim of restitution on its own behalf. Agency law squarely refutes that logic: while a distinct legal entity -- such as a partnership or corporation -- may be organized to act as an agent for a collective of principals (i.e., partners or shareholders) for certain purposes, it is firmly settled that monetary claims belonging to the distinct agent entity belong *only* to that entity, and *cannot* be asserted by individual principals. Thus, shareholders and partners cannot sue individually on a debt or claim that belongs to the corporation or partnership. *See Vinal v. West Virginia Oil & Oil Land Co.*, 110 U.S. 215, 215 (1884) ("One partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted, in his own name alone, against the debtor."); *KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1324 (11th Cir. 2004) ("And, of course, [a partner] in his individual capacity cannot pursue a claim on behalf of [the partnership]."); *Creek v.*

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that the Commission, rather than the party States themselves, provided North Carolina with approximately $80 million in financial assistance.").

Village of Westhaven, 80 F.3d 186, 191 (7th Cir. 1996) (describing "general rule" that just as a "shareholder has no right to seek damages for an injury to the corporation, even if he is the sole shareholder. . . . a partner may not sue individually to recover damages for an injury to the partnership, even though a partnership is a thinner veil between the enterprise and its owners" (citations omitted)); *see Bromberg & Ribstein on Partnership* § 1.03(c)(3) ("a partner cannot sue individually on a claim belong to the partnership"); 59A Am. Jur. 2d *Partnership* § 448 (2003) ("a cause of action accruing to the partnership, for damages to the partnership property or interests, belongs to the partnership rather than to individual partners"). While a shareholder or partner normally may bring a derivative action *on behalf of* the entity, that claim, too, belongs *solely* to the entity; it does not belong to the individual shareholder or partner asserting the claim. *See Koster v. Lumbermens Mut. Cas. Ins. Co.*, 330 U.S. 518, 522 (1947) ("The cause of action which such a plaintiff brings before the court is *not his own* but the corporation's." (emphasis added)); *Handelsman v. Bedford Village Ltd. P'ship*, 213 F.3d 48, 54 (2d Cir. 2000) (Sotomayor, J.) (noting rule that partners lack standing to sue on debt to partnership); *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1194 (7th Cir. 1985) ("a stockholder of a corporation has no personal or individual right of action against third persons for damages that result indirectly to the stockholder because of an injury to the corporation"); 59A Am. Jur. 2d *Partnership* § 907 (2003) ("By its very nature, a stockholder's derivative action does not seek to enforce the rights

of individual shareholders but those of the corporation, from which the shareholders derive only incidental benefit.").

Plaintiffs' theory that the States themselves could assert their own restitution claim for money disbursed by the Commission cannot be reconciled with the foregoing black-letter rule. The Compact expressly provides that "[t]he Commission . . . is a legal entity separate and distinct from the party states" and ensures that "[l]iabilities of the Commission shall not be deemed liabilities of the party states." Article 4(M)(1). The Commission is a "discrete entity created by constitutional compact . . . [that] is financially self-sufficient; it generates its own revenues, and it pays its own debts." *Hess v. Port-Authority Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994); *see Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (reference "to a 'separate legal person'" indicates "that Congress had corporate formalities in mind"). Having chosen the limited-liability benefits of the corporate structure, the plaintiff States cannot now disregard its limitations. *See Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234, 1241 (10th Cir. 2006) ("[W]here parties choose the corporate form and receive all the benefits that flow from that structure, we should be hesitant to ignore the consequences."). Like a corporate shareholder or limited partner, the plaintiff States lack authority to pursue their own individual claims seeking recovery of moneys provided by the association entity. Those claims belong exclusively to the Commission in its own distinct legal capacity.

Plaintiffs do not and cannot cite any case from any jurisdiction holding that an individual member of a distinct legal corporate-type entity (i.e., an entity authorized to sue or be sued on its own behalf) may sue individually to recover on a debt owed to the entity. Plaintiffs rely heavily on *Central States Trucking Co. v. J.R. Simplot Co.*, 965 F.2d 431 (7th Cir. 1992), but the case actually *undermines* their position. The defendants in that case individually controlled and personally funded the association held to be their agent; each member personally directed when and how the association would ship the member's goods, and each member paid the association directly for requested shipments by depositing funds into the member's own individual account. *Id.* at 432-35 & n.2. In that situation, where the collective entity effectively acts as a trustee for each member's goods and funds, the individual member has a right to pursue and protect those funds. But where, as here, the members have only an undifferentiated interest in the entity's assets from which they derive only incidental benefits -- like the interests of shareholders in a corporation's assets or the interest of partners in partnership assets -- they "do not have standing to sue in an individual capacity for injury to the [entity]." *Fletcher Cyclopedia of the Law of Private Corporations* § 5939, at 24.

In sum, only the Commission can assert a claim for restitution of funds disbursed by the Commission to North Carolina. Plaintiffs have not identified any legal theory by which the States could pursue restitution on their own. And this Court's precedent

does not allow a State to assert a claim by a non-State entity or person that otherwise would be barred. *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In *North Dakota*, the Court held that the Eleventh Amendment precluded it from maintaining jurisdiction over a claim by one State against another, where the plaintiff State was merely seeking damages to be paid directly to private persons whose own claims were barred by the Eleventh Amendment. *Id.* at 375-76.

So it is here. The States can only assert their own claims. And because they have no independent claim to restitution, the Commission cannot piggy-back its restitution claim on the States'. The Commission's claim can be asserted only by the Commission, and therefore must be dismissed.

3. *There Is No Procedural Barrier To Holding That The States Cannot Assert The Commission's Own Restitution Claim*

The Solicitor General does not disagree substantively with the foregoing analysis, but she contends that it is premature to rule that the Commission is only asserting claims that cannot be asserted by the States. The Solicitor General takes at face value the generic, combined claims for relief asserted in the Bill of Complaint, which by its terms seeks the same relief on behalf of all plaintiffs, without distinguishing between claims legally and factually available to the Commission and those legally and factually available to the States. U.S. Br. 17 & n.4. According to the Solicitor General, the

Special Master made a simple "case management" decision to reserve judgment as to whether the Commission is *permissibly* asserting the same claim as any of the States. U.S. Br. 10. That argument, says the Solicitor General, "goes to the *merits* of the claims," and therefore cannot be considered on "a motion to dismiss the Commission on *jurisdictional* grounds." *Id.* at 17.

The Solicitor General's argument simply ignores the basic procedural rules for adjudicating jurisdictional issues. The requirements of jurisdiction must be established "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see Bennett v. Spear*, 520 U.S. 154, 167-68 (1997); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-15 & n.31 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). Thus, at "the pleading stage, general factual allegations" adequate to establish jurisdiction will suffice. *Lujan*, 504 U.S. at 561. "In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts" sufficient to defeat the motion. *Id.* (quotations omitted).

Accordingly, plaintiffs here cannot simply rest on their Bill of Complaint's undifferentiated prayer for relief. Although North Carolina bases its argument on jurisdictional grounds, the issue is presented at *the summary judgment stage*, compelling the

Commission to put forth a concrete factual and legal theory sufficient to establish its entitlement to overcome North Carolina's sovereign immunity. And North Carolina's motion came at the express invitation of the Special Master, who rejected a similar motion at the pleading stage, holding that it was *at that time* premature to determine whether the States and the Commission had a factual and legal basis for asserting the same claims. P.R. 13. In so ruling, the Special Master stated: "North Carolina is free to renew its motion to dismiss if and when the Commission attempts to pursue a claim legally foreclosed to the States." *Id.* at 13-14. Indeed, most of the subsequent discovery process was directed at precisely that issue, *viz.*, what claim for relief was the Commission asserting, what was its basis, and how did it differ, if at all, from the claims being advanced by the States. It was in that discovery process that plaintiffs first advanced their theory that the Commission acted as the States' agent in collecting and disbursing the funds. Def. App. 102a-151a.

It is thus not premature to determine whether plaintiffs have adduced facts that, if true, would establish that the States and the Commission have identical legal claims for recovery against North Carolina based on the agency theory plaintiffs have articulated. The summary judgment record shows just the opposite: *only* the Commission can pursue a claim for restitution against North Carolina, because neither the Compact nor general agency principles gives the States any independent basis for seeking restitution of funds disbursed by the Commission, as

just shown.[3] Nothing more is needed to establish North Carolina's sovereign immunity from suit against that claim. And for that reason, North Carolina cannot be fairly accused of attempting an "end run" around the Special Master's case management efforts. U.S. Br. 10. If, as North Carolina contends, plaintiffs have not shown what they must show to proceed past summary judgment -- *viz.*, that the States have a legally cognizable and factually viable basis for asserting the same restitution claim asserted by the Commission -- then the Special Master's refusal to grant North Carolina's motion is *a substantive legal error*, not a mere case-management decision. Other than casually insulting North Carolina for invoking the normal summary judgment process for adjudicating an Eleventh Amendment jurisdictional (or any other) issue, the Solicitor General does not advance any serious *substantive* reason for denying North Carolina's motion.[4]

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[3] This is especially (but not only) true if the States' breach of Compact claim is rejected, as the Special Master recommended. Because the States did not pay money to North Carolina, they cannot pursue restitution as a contract remedy. Even if they could in theory, where there is no breach of Compact, the States most certainly have no factually or legally cognizable basis for seeking restitution. *See infra* Part II.

[4] In a footnote the Solicitor General suggests that North Carolina's request for dismissal of all claims brought by the Commission is "overbroad" "even if only the Commission could pursue restitution," because the Complaint also seeks other relief on behalf of the Commission, including

Plaintiffs, however, suggest that so long as a complaint on its face seeks relief that would overcome Eleventh Amendment barrier to suit, that suit may proceed to judgment no matter how the case develops beyond the complaint. Pls. Reply 8. That suggestion cannot be reconciled with the rule that jurisdictional challenges be evaluated according to the manner and evidence required at the successive stages of the litigation. *Lujan*, 504 U.S. at 561.[5] Further, it would be fundamentally

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summary enforcement of the sanctions order, damages, and other relief. U.S. Br. 17 n.4. The Solicitor General again misses the point: the issue is not what the Commission generally seeks in the Complaint, but whether the Commission has established a legal and factual basis for such relief adequate to survive summary judgment. The answer is no: the Commission cannot pursue relief under Count I (enforcement of the monetary sanctions) because the sanctions were not authorized by the Compact, or under Count II (breach of Contract) because the Commission was not a party to the Compact. At this stage of the proceedings, the Commission's *only* remaining claims seek restitution of the financial assistance it provided to North Carolina.

[5] Contrary to plaintiffs' assertion, nothing in *Arizona* limits the jurisdictional analysis solely to the pleading stage. Pls. Reply 8. Further, unlike here, the *Arizona* Court could tell whether or not the claims of the parties were identical by comparing the original claims of the United States with the subsequent claims asserted separately by the intervenors. The Tribes in *Arizona* intervened "to participate in an adjudication of their vital water rights that was commenced by the United States" *on their behalf*. *Arizona v. California*, 460 U.S. 605, 614

contrary to Eleventh Amendment immunity to permit a non-State entity to join a State's action on a complaint seeking undifferentiated relief, but then ultimately seek its own relief from the defendant State's treasury on a claim legally unavailable to the plaintiff State. That approach would render *North Dakota* a dead letter: there would be no reason to bar a State from asserting relief on behalf of a private party, if the private party could simply join the State's suit but ultimately pursue its own independent relief. What the States consented to in the plan of the Convention was monetary and other actions by the United States and other States -- not claims by *other* parties seeking monetary relief that neither the United States nor any State could pursue.

(1983). Here, the party States are not suing on behalf of the Commission, but purport to be asserting their own distinct rights, and the Commission has not sought to intervene merely restating the States' independent claims. *Id.* at 612. Rather, the parties have from the outset co-mingled their substantive allegations in a joint pleading, with undifferentiated claims for relief. By definition, the claims of States and non-State entities will always be identical, to the extent they rest on a joint complaint that only identifies the claims asserted and the relief sought as being on behalf of "the Plaintiffs." A State's sovereign immunity -- "a fundamental aspect of its sovereignty," *Alden v. Maine*, 527 U.S. 706, 713 (1999) -- cannot be so easily stripped by the stroke of the complaint drafter's pen.

B. Even If The Commission's Claims Were Theoretically The Same As The States', The Commission Still Could Not Assert Them Because North Carolina Is Categorically Immune From Suit By The Commission.

While the plaintiff States are entitled to proceed against North Carolina on whatever claims they can sustain, North Carolina remains immune from suit by the Commission, unless and until (1) North Carolina consents to such suit, or (2) Congress expressly abrogates such immunity. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

Plaintiffs and the Solicitor General cite a third exception to North Carolina's sovereign immunity, *viz.*, a non-State entity may assert claims against a State so long as the same claims are already being pursued by another State or the United States. As already shown, however, this third exception has no application here, because the many months of discovery preceding the filing of cross motions for summary judgment have made clear that the Commission's restitution claim is *not* the same claim the States are asserting. And even if it were, the third exception is contrary to basic principles of Eleventh Amendment and common-law sovereign immunity.

Plaintiffs and the Solicitor General rest the third exception on *Arizona v. California*, 460 U.S. 605 (1983), and *Maryland v. Louisiana*, 451 U.S. 725

(1981), but those cases cannot be reconciled with subsequent precedents re-confirming that "a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank*, 527 U.S. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

The Solicitor General concedes that this Court's more recent precedents have "understood sovereign immunity as based on something more than jurisdictional limits." U.S. Br. 15 (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)). But according to the Solicitor General, *Arizona's* analysis is consistent with more recent cases (*Maryland* has no substantive analysis at all) because it "simply recognizes that, when a State does not have sovereign immunity against certain claims . . . then the State's sovereign immunity 'is not compromised' by the participation of an additional party in the suit with respect to that same claim." U.S. Br. 15-16 (quoting *Arizona*, 460 U.S. at 614). It is difficult to understand why sovereign immunity should operate that way, if it is a privilege of each State, to be waived only at the State's pleasure (barring abrogation or constitutional consent). The Solicitor General cites no precedent holding that a State's waiver of immunity in a case involving one private party constitutes an automatic waiver of immunity against all private parties who insist they have the "same claim." Likewise, the fact that the States generally consented in the plan of the Convention to suits by other States and the United States does not mean they *also* automatically consented to suits by private parties seeking the same relief.

This case illustrates the practical problem with such an approach. If a private party may overcome a State's sovereign immunity simply by joining a plaintiff State's complaint asserting the same undifferentiated claims, what happens if discovery and summary judgment proceedings show that the State's claims are invalid, leaving only the private party to recover? The Solicitor General surely would agree that the defendant State's sovereign immunity is "compromised" by allowing the private party to recover at that point. Sovereign immunity is about being free from suit without consent, but it is not *only* about being free from the legal process itself -- it is most centrally about avoiding legal exposure to private monetary creditors. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821); *see also Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002) ("suits for money damages against the State" are "the heart of the Eleventh Amendment's concern"). Rather than permit private parties and other non-State entities to join otherwise valid State actions over the objection of non-consenting States, the appropriate approach -- indeed, the only approach consistent with the fundamental nature of sovereign immunity -- is to permit the State to decide for itself when and by whom it may be sued in federal court. To the extent a non-State entity has interests in the claims being asserted, they should by definition be protected by the State already asserting them, if they are truly they same claims -- and to the extent the claims are distinct, that circumstance only underscores the reason the defendant State cannot be forced to litigate that distinct claim absent the State's own consent.

C. North Carolina Has Not Consented To Suit By The Commission, Either In The Southeast Compact Or In The Plan Of The Convention.

Plaintiffs finally argue that even if the Commission's claims are distinct from those of the States (or this Court overrules precedents allowing non-State entities to assert the same claims as States), the Commission's claims should still be allowed to proceed here, either because North Carolina consented specifically to suit by the Commission merely by joining the Southeast Compact, or because the States generally consented to suits by Compact entities in the plan of the Convention. Both arguments are meritless.

1. The Southeast Compact does not reflect a waiver of sovereign immunity by North Carolina. The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *College Sav. Bank*, 527 U.S. at 675 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). The State's waiver must be "unequivocally expressed," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984), in language that is "unmistakably clear," *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987). In other words, this Court will "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citations omitted).

Contrary to plaintiffs' submission, the language of the Compact comes nowhere close to satisfying that stringent test for waiver of North Carolina's immunity from suit in this Court. Plaintiffs, in fact, do not even purport to apply the stringent standard. Instead they argue only that a waiver can be *implied*, from the language in Article 4(E)(10) authorizing the Commission to "act or appear on behalf of any party state or states . . . before . . . any court of law." Pls. Reply 23. Read together with the Commission's sanctions authority in Article 7(F), plaintiffs insist that States entering the Compact "would have understood" that they were exposing themselves to suit by the Commission in federal court to enforce a sanctions order. *Id.* at 24.

This makes no sense. Article 4(E)(10) by its terms merely states that the Commission may appear in any court of law; it does not even *suggest* that the member States consent to be sued by the Commission, much less unequivocally and unmistakably express such consent. Nor does the Commission's sanctions authority alter the analysis. For one thing, that authority is limited to the suspension and revocation of a party State's rights under the Compact -- sanctions that can be imposed and enforced without suit in this Court. For another thing, as this very case illustrates, to the extent that suit must be brought in this Court to enforce a party State's compliance with Compact terms, that suit can be brought by other member States. Because nothing in the express terms or necessary operation of the Compact requires that party States be subject to suit by the Commission, the States did not waive

their immunity from suit merely by joining the Compact.

Plaintiffs rely heavily on the trial and appellate decisions in litigation involving the Central Interstate Low-Level Radioactive Waste Compact, 99 Stat. 1864 (1986) (Pls. Reply Br. 21-25), but those decisions are neither binding on this Court nor relevant even on their own terms. In that litigation, the courts held that Nebraska did unambiguously waive its immunity by entering the Compact, but only because of key provisions in the Central Compact that do not appear in the Southeast Compact. The Central Compact provides not only that its Commission may "initiate any proceedings" before "any court of law" over matters "arising under or relating to the terms of the provisions of this compact" (Article IV.e., 99 Stat. 1866), but also that its Commission shall "require all party states and other persons to perform their duties and obligations arising under this compact by *an appropriate action in any forum designated in section e. of Article IV*" (Article IV.m.8, 99 Stat. 1868). It was the latter provision -- conspicuously absent from the Southeast Compact -- that was held to constitute a waiver of immunity:

> When it signed the Compact, Nebraska consented to a suit brought by the Commission in federal court. The words and structure of the Compact and the Congressional enabling legislation plainly authorize the Commission's suit. In fact, the Commission is "required" to sue Nebraska in

> "any forum" and in "any court of law" chosen by that body. Still further, the Compact specifically provides that the federal court has the power to review disputes between the Commission and Nebraska.

Entergy Arkansas, Inc. v. Nebraska, 68 F. Supp. 2d 1093, 1103 (D. Neb. 1999); *see also* 241 F.3d 979, 986 (8th Cir. 2001) (court of appeals opinion in the same case: "Based on the nature of the Compact and the language of Article IV(e), we held 'that by entering into the Compact, Nebraska waived its [Eleventh Amendment] immunity from suit in federal court by the Commission to enforce its contractual obligations.'"). While *Entergy* thus establishes that a State *can* waive its immunity by joining a Compact that expressly authorizes its Commission to enforce its provisions by suing member States in federal court, it also demonstrates indirectly why North Carolina did *not* waive its immunity by entering into the Southeast Compact, which includes no such enforcement provision.

2. There is also no merit to plaintiffs' contention that the States generally consented to suit by interstate compact entities in the plan of the Convention when they adopted the Interstate Compact provision. As the Solicitor General has explained: "A Compact Clause entity is not a 'State' within the meaning of the Constitution, and the Commission has pointed to no source of authority for Congress to provide that a Compact Clause entity shall have (or be able to assert) the constitutional entitlements of a State in an Article III court as

against a defendant that *is* one of the States of the Union." U.S. Br. No. 131, Orig., at 13.

Plaintiffs' argument that consent to suit by Compact Clause entities is inherent in the Clause itself rests not on any language on the Clause, but on its supposed logic: "It logically follows from the nature of an interstate Compact," plaintiffs contend, "that a Compact Clause entity should be able to sue a State on behalf of a sister State in order to enforce the underlying compact." Pls. Reply 21. But the logic does not follow at all. Plaintiffs do not cite a single case in the first two centuries of the Republic involving a suit by a Compact Clause entity against a party State -- a clear demonstration that such suits are not logically necessary to the operation of the Compact Clause. Again, as this case shows, compacts normally can be enforced by the party States themselves -- there is no inherent reason Compact Clause entities *must* have that same authority, and absolutely no historical evidence that the Framers assumed they would have such authority. To be sure, the drafters of a *particular compact* might believe the compact would function more efficiently if the party States consent to suit directly by the Compact Clause entity, but in such circumstances the States are free to provide that consent as a condition of joining the compact. The States that joined the Central Compact agreed to

that condition, for example; the Southeast Compact States plainly did not.

Plaintiffs again cite *Entergy*, as if the case included a broad holding that States generally waived their immunity from suit by all Compact Clause entities. Pls. Reply 22. The case holds no such thing. Rather, *Entergy* holds only that "in a case *involving a suit brought by a Compact Clause entity specifically authorized to sue a signatory state*, the Eleventh Amendment is not applicable." 68 F. Supp. 2d at 1099 (emphasis added). The very fact that the Central Compact specifically includes a waiver provision establishes that such waivers are not generally implied by the mere existence of the Compact Clause itself.

Because the States did not generally consent to suit by Compact Clause entities merely by ratifying the Compact Clause as part of the Constitution, and because North Carolina did not consent to suit by the Commission merely by joining the Southeast Compact, the Commission's claims must be dismissed.

II. IF NORTH CAROLINA IS ENTITLED TO SUMMARY JUDGMENT ON THE BREACH OF COMPACT CLAIM, THEN PLAINTIFFS' REMAINING EQUITABLE CLAIMS NECESSARILY FAIL AS A MATTER OF LAW.

North Carolina's second exception challenges the Special Master's failure to grant summary judgment on plaintiffs' claims for equitable relief, which are all based on the same conduct plaintiffs allege to be in breach of the Compact. As the long line of precedent cited in North Carolina's opening brief shows, where an express contract governs the parties' relationship, conduct that does not breach the contract cannot be the subject of a separate equitable claim for relief. NC Br. 58-59. Thus, if the Court agrees with the Special Master that North Carolina did not breach the Compact by first suspending its licensing efforts and then withdrawing from the Compact before completing a facility, plaintiffs cannot then circumvent the failure to prove a breach of Compact by recasting it as violative of unwritten equitable obligations.

In response, plaintiffs assert that "equitable claims, such as unjust enrichment, are available as alternatives to a claim for breach of contract." Pls. Reply 26. But as explained by the very authority they cite, that is true only where no "enforceable

contract" already exists between the parties governing the subject matter. Williston & Lord, *A Treatise on the Law of Contracts* § 68:5, at 58 (4th ed. 2003). If there is no valid contract on which to sue, then equity may create an obligation. But where, as here, there is a contract defining the scope and limits of each contracting party's obligations to the other, the cases cited by North Carolina -- almost entirely ignored by plaintiffs -- uniformly hold that equity will not establish an additional obligation, overlooked by the parties, concerning the same subject matter. *See, e.g., Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) ("When a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement."). North Carolina thus does not assert any "sovereign prerogative to prevent other States in the Compact from bringing equitable claims against it." Pls. Reply 29. Rather, plaintiffs' equitable claims fail *on their own terms*, based on the universal judicial understanding that such claims cannot be based on conduct already specifically governed by an enforceable contract that the defendant did not breach.

Plaintiffs' misunderstanding of this principle is reflected in their contention that the $80 million in financial assistance "was conveyed to North Carolina in reliance on the [Compact], not pursuant to an

express term of the Compact," and thus if the Court finds that North Carolina did not breach its Compact obligations, plaintiffs "will be entitled to equitable remedies for providing $80 million to North Carolina in reliance on the Compact." Pls. Reply 27. The conclusion does not follow from the premise; indeed, the premise *refutes* the conclusion. If plaintiffs acted in reliance on a Compact obligation *that North Carolina did not breach*, then North Carolina cannot be compelled by equity to compensate plaintiffs for the damages they allegedly incurred in relying on that obligation. To hold otherwise would be to add to the express Compact an additional, unwritten obligation North Carolina never agreed to assume. The point of the cases cited by North Carolina is that equity *cannot* be used to effectively modify the terms of an express contract that already governs the conduct at issue. *See, e.g.*, *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 50 (Tex. 2008) (where insurer did not breach express contractual coverage obligation, court refused to recognize equitable right to reimbursement).

Plaintiffs have no serious answer to that principle. Their basic position reduces to a plea to be saved from the consequences of their own failure to amend the Compact, or otherwise obtain from North Carolina an express promise to repay the money or license a facility before withdrawing from the

Compact, as a condition of providing financial assistance. So long as North Carolina did not breach an obligation under the Compact in accepting the financial assistance and using it in furtherance of its attempt to license a facility, North Carolina cannot be required by equity to return the money when such licensing efforts were ultimately unsuccessful.

Finally, plaintiffs baldly assert that their equitable claims "rest on factual and legal determinations" the Special Master has not made (Pls. Reply 30), but they do not explain what those determinations are, or how they could preclude summary judgment under the foregoing analysis. There is simply no legal principle, and no fact in the summary judgment record, that would entitle plaintiffs to recover against North Carolina in equity for failing to license a facility, if North Carolina's actions did not breach the Compact defining its licensing obligations. If the Court agrees with the Special Master that, on the undisputed facts, North Carolina did not breach the Compact, the Court should further hold that plaintiffs' equitable claims fail as a matter of law.

CONCLUSION

The Exceptions of the State of North Carolina to the Preliminary Report and the Second Report of the Special Master should be sustained. North Carolina's motions to dismiss all claims brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission and for summary judgment as to Counts III, IV, and V of the Bill of Complaint should be granted.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

* *Counsel of Record*

September 2009

Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

No. 132, Original

IN THE
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary and Second Reports of the Special Master

BRIEF IN SURREPLY TO NORTH CAROLINA'S REPLY

TROY KING
ATTORNEY GENERAL
ALABAMA
BILL MCCOLLUM
ATTORNEY GENERAL
FLORIDA
ROBERT E. COOPER JR.
ATTORNEY GENERAL
TENNESSEE
WILLIAM C. MIMS
ATTORNEY GENERAL
VIRGINIA

Counsel for Plaintiffs

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

* Counsel of Record

September 9, 2009

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, N.C. 27605
(919) 828-2501

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INTRODUCTION

North Carolina accepted $80 million from the Plaintiff States via the Southeast Compact Commission to build a low-level radioactive waste disposal facility. North Carolina did not build the facility or give the money back. Instead, it took the Plaintiffs' money for nearly 11 years and then withdrew from the Compact. This left the Plaintiffs with nothing to show for their investments of time and money, and gave North Carolina an $80 million head-start toward constructing its own lucrative facility should it choose to do so.[1] North Carolina argues that it can retain this windfall and escape responsibility to its sister States and the Southeast Compact Commission. It is wrong for three reasons.

First, the Compact authorizes the Commission to remedy this grossly unfair behavior. It grants the Commission the power to impose monetary sanctions. Indeed, the Compact anticipated North Carolina's specific maneuver by making clear that a party State in breach of the Compact retains its obligations to its Compact partners even if it withdraws on the eve of a sanctions hearing. The Court should uphold the Commission's sanctions authority.

Second, the Compact's text explicitly makes the Commission "the judge" of the party States' "compliance with the conditions and requirements of this compact." Art. 7(C). The Commission exercised this authority and found breach. Independent of the Commission's sanctions determination, this Court

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[1] South Carolina's facility collected over $47 million in fees in 2008 alone. Distribution of Barnwell Disposal Revenues, Fiscal Year 2008, http://www.energy.sc.gov/publications/Revenue%20Distribution%20FY2008.pdf.

should affirm the Commission's determination that North Carolina breached the Compact.

Third, the Commission's judgment of breach is confirmed by the application of normal contract law principles. North Carolina has admitted that after December 1997, it took no steps to license a facility, breaching its contractual duty to take "appropriate steps" to do so. Furthermore, North Carolina explicitly repudiated its Compact duties. Finally, North Carolina breached its duty of good faith when, after taking $80 million from the party States, it walked away, leaving those States with nothing.

For each of these reasons, the Court should hold North Carolina liable for its conduct as a matter of law.

I. THIS COURT SHOULD ENFORCE THE SANCTIONS AGAINST NORTH CAROLINA.

The Compact provides that the Commission may sanction North Carolina for the breach of its duties under the Compact. North Carolina may not avoid this sanction by withdrawing from the Compact on the eve of the sanctions hearing.

A. The Compact Provides For Sanctions, Including Monetary Sanctions.

The Compact states:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, *including* suspension of its rights under this compact and revocation of its status as a party state.

Art. 7(F) (emphasis added).

North Carolina argues that the Compact authorizes the Commission to punish breaches only by denying a "'State the benefits of Compact membership,'" Def. Reply 4, *i.e.*, by "suspension of its rights under this compact and revocation of its status as a party state." Art. 7(F). Put differently, North Carolina argues that "including" means "limited to," and consequently, it cannot be punished for its actions.[2] Cf. US Br. 22 ("plaintiffs are correct that 'include' is not a term of limitation").

North Carolina cites *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992), for the proposition that "the term 'sanction' does *not* always mean any penalty or coercive measure, but must be interpreted according to its context." Def. Reply 12. But, Plaintiffs are not arguing that the Compact authorizes any conceivable sanction, including imprisonment. *Id.* 11. Instead, Plaintiffs contend that in this context, the clause authorizes them to get their money back.

North Carolina's argument thus rests on the counter intuitive proposition that "sanctions" as used in the Compact does not encompass monetary sanctions. North Carolina's suggestion that *Ohio* supports that proposition is wrong. That decision *as-*

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[2] The Special Master concluded that North Carolina did not waive its right to contest the legality of the sanctions hearing by refusing to participate. Preliminary Report 32-33. North Carolina and the United States erroneously suggest that Plaintiffs abandoned their third exception challenging this conclusion. *See* Def. Reply 4 n.1 (citing Preliminary Report 32-33); US Br. 20 n.6. Plaintiffs' opening brief recited this exception, which requires no argument beyond stating that North Carolina "refused to participate" in the sanctions hearing, *see* Pls.' Exceptions 17, and therefore that it forfeited the right to contest the sanction imposed.

sumed that the term "sanction" included coercive monetary fines – the most reasonable way to interpret that word. *Ohio*, 503 U.S. at 621-23, 625.

North Carolina's interpretation would make most of Article 7(F) meaningless. The Compact could simply have authorized the Commission to suspend a party State's rights or revoke its status, and there would have been no need for the general sanctions authorization. A reading that makes part of the statute superfluous must be rejected. See, *e.g.*, Def. Reply 10 (quoting *FCC* v. *Nextwave Pers. Commc'n, Inc.*, 537 U.S. 293, 302 (2003)). Moreover, the Compact's drafters had numerous ways to indicate that the two remedies listed were exclusive (*e.g.*, by using the words "by" or "limited to," rather than "including"). They did not, and their choice should be given effect.

When the term "sanctions" is given its normal meaning – which encompasses, at a minimum, coercive or punitive monetary penalties, *Ohio*, 503 U.S. at 621-23 – the specification of suspension and revocation serves an important purpose. It indicates what penalties are available apart from, and more severe than, normal monetary penalties. Thus, the sanctions provision is analogous to a contract clause providing for specific performance in limited circumstances; it lists the remedies that the Commission may seek beyond the usual monetary recourse.

North Carolina also offers a grab-bag of unconvincing arguments to ignore the text of Article 7(F).

1. The first several arguments depend on "discerning" the meaning of the Southeast Compact by comparing it to compacts drafted by separate parties although the respective compact authors had no meaningful interaction during the drafting process. North Carolina relies on the proposition articulated

in *Russello* v. *United States* that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 464 U.S. 16, 23 (1983) (quotation marks omitted).

That rule does not apply here. Congress did not draft the Compacts. They were separately drafted by the individual sets of party States through negotiation and were approved by Congress without amendment. Their appearance together in a federal law is the result solely of the fact that these individual groups of States acted pursuant to the same Congressional authorization. As the other compact commissions explain, "[t]he language of the individual compacts may have been approved by Congress contemporaneously, but they were drafted and enacted by state legislatures independently and considered separately by Congress over the course of several years." Br. of Rocky Mountain Board 11. As a result, the compacts vary substantially in their detail and structure, and no interpretive guidance is gained by parsing their differences.

This Court does "not read the enumeration of one [provision] to exclude another *unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.*" *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (emphasis added). There must be some association "justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Id.* *Russello*'s general presumption does not apply here. Neither North Carolina nor the United States explains why Congress would have intended some compacts to be enforceable by monetary sanctions while others were

not. The Southeast Compact's reference to "sanction" should be understood to carry its ordinary meaning that embraces monetary penalties.

In all events, a comparison of the differences among the compacts does not support North Carolina's argument. For instance, North Carolina argues that in light of the express reference to monetary sanctions in other compacts, the omission of such a reference in the Southeast Compact indicates that such sanctions may not be awarded. Def. Reply 6-7. But, the Southeast Compact and the Northeast Compact are the only compacts that generally authorize "sanctions." Northeast Interstate Low-Level Radioactive Waste Management Compact "Northeast Compact," Pub. L. No. 99-240, tit. II, § 227, Art. IV(i)(14), 99 Stat. 1909, 1915 (1986). The Rocky Mountain Compact, for example, specifically authorizes only exclusion and contains no general sanctions authority. Rocky Mountain Interstate Low-Level Radioactive Waste Management Compact "Rocky Mountain Compact," Pub. L. No. 99-240, tit. II, § 226, Art. VIII(e), 99 Stat. 1902, 1909 (1986). Applying North Carolina's rule of construction, the Southeast Compact – which confers the specific authority to exclude *and* general sanctions authority – must give the Commission sanctions power *beyond* exclusion.[3]

In addition, among the seven low-level radioactive waste compacts ratified in 1985, the term "sanctions" is used only twice in the context of compelling unwill-

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[3] The United States agrees with Plaintiffs that the Southeast Compact must "authorize sanctions other than exclusion," but does not suggest what non-exclusionary sanctions the Compact authorizes if not monetary sanctions. See US Br. 27 n.8 & 22. Neither the United States nor North Carolina suggests any plausible purpose for the Compact's general authorization of sanctions other than authorizing monetary sanctions.

ing party States to act – the Southeast and Northeast Compacts. If one follows North Carolina's interpretive principles, then "sanctions" must have the same meaning each time it appears. *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). The Northeast Compact defines "sanctions" as "fines, suspension of privileges and revocation of the membership of a party state". Northeast Compact, Art. IV(i)(14). Thus, "sanctions" in the Southeast Compact should be read to include these elements.

As these comparisons reveal, comparisons to other compacts are not helpful. The term sanction should be given its normal meaning.

2. North Carolina fails to deal coherently with the portion of the Compact's sanction provision that provides: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F). Because this sentence requires party States to retain their obligations under the Compact until the effective date of the sanction imposed, it necessarily contemplates a sanction that *can* be imposed on a party that has withdrawn from the Compact – *i.e.*, a monetary sanction.

North Carolina suggests that this provision only applies to *current* party States. Def. Reply 12-13. But the Compact does not limit Article 7(F) to current party States. Instead, it applies to any state "declared a party state to the compact," as North Carolina clearly has been.

3. North Carolina mysteriously claims that a "monetary penalty ... has nothing to do with the party States' Compact rights and obligations." *Id.* 13. The United States makes the similar assertion that a

monetary sanction would not "have any impact on an offending State's 'rights and obligations' under the Compact." US Br. 24. But a monetary penalty *is* an obligation, incurred due to the breach of a Compact obligation. And both North Carolina and the United States recognize this point elsewhere in their briefs. See Def. Reply 22 (incorrectly arguing that when it "resigned from the Compact, it had *no* monetary *obligations*," *i.e.*, no pending monetary penalty) (second emphasis added); US Br. 30 n.9 ("Were the Compact construed to permit the Commission to order North Carolina to return the funds it received during its Compact membership, North Carolina should not be allowed to avoid that *obligation* by exercising a unilateral right to withdraw.") (emphasis added).

4. North Carolina's further argument that revocation is an adequate punishment for all Compact breaches is disingenuous. As North Carolina's conduct indicates, a designated host State cannot be effectively punished for breach *except* by monetary sanctions. North Carolina asserts that by withdrawing it has "'imposed upon itself the most severe sanction available.'" Def. Reply 23. But, North Carolina was rewarded for its breach with an $80 million head-start toward constructing a facility. The notion that North Carolina punished itself by *voluntarily* withdrawing from the Compact is ridiculous.

5. North Carolina implies that the Commission has only the powers listed in Article 4(E). *Id.* 3-6 (arguing that 4(E) sets out all of the Commission's powers and other sections provide only the mechanisms for using those powers). This contradicts the Compact's plain text. Article 7 establishes many separate powers wielded by the Commission that are not mentioned in Article 4(E). For example, Article 7(D) states:

> The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article 4(H)(1), shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission; shall cause legislation to be introduced in the Congress which grants the consent of Congress to this compact, and shall do those things necessary to organize the Commission and implement the provisions of this compact.

Article 7 independently confers powers on the Commission not set out in Article 4.

Regardless, a contextual examination of Article 4(E) supports Plaintiffs' position, not North Carolina's. By that provision, the Commission is empowered "to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility." Art. 4(E)(7). If Article 7(F)'s separate provision generally authorizing "sanctions" is to be given some effect, then "sanctions" must mean something more than suspension. of rights or revocation of Compact membership. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476-77 (2003) (requiring statutory construction that does not "render a statutory term superfluous"). See *supra* at 4.

6. Finally, both North Carolina and the United States argue for a clear-statement rule – that is, all ambiguity must be construed against a party enforcing a sanctions award. US Br. 24-26; Def. Reply 14 n.2, 40. The United States asserts that this rule would "encourag[e] States to resolve their differences and address issues of multistate and national concern through mutual agreement." US Br. 25.

But a rule that generally interprets compacts to immunize breaching parties from punishment will discourage states from using compacts. Indeed, the purpose of the Tucker Act, 28 U.S.C. § 1491, which waives the United States' sovereign immunity against suits by contracting parties, is to reassure the United States' contract partners that it cannot breach its contracts with impunity. See also Br. of Rocky Mountain Board 17-18 ("When a compact state, such as North Carolina, feels free to disregard its obligations to other compact states, the very foundation of the compact system is eroded."). When this Court interprets a contract under the Tucker Act, it does not place a thumb on the interpretive scale for the United States. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms."). Rendering compacts unenforceable will discourage their use.

B. A Party May Not Escape Sanctions By Withdrawing From The Compact.

As noted, Article 7(F) concludes: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." This text makes clear that a party cannot escape sanctions by withdrawing.

North Carolina responds by arguing that if one followed the literal text of Article 7(F) "the Commission could impose sanctions on a former party State at *any time* in the future, so long as the ostensible 'hook' for the sanctions is conduct that occurred during the State's membership in the Compact." Def. Reply 19. But, established doctrines such as laches would prevent any unreasonable delays.

North Carolina, moreover, cannot rely on those doctrines here. On June 21, 1999, Florida and Tennessee filed a Sanctions Complaint against North Carolina. Realizing that the Commission would not continue to provide it with funds, North Carolina withdrew from the Compact on July 26, 1999. The Commission called a hearing, according to its Sanctions Procedure, and declared North Carolina in breach, ordering sanctions on December 8, 1999, which North Carolina declined to pay. On July 10, 2000 the Commission filed an original action. The Commission has acted promptly at each juncture.

Next, North Carolina asserts that when it "resigned from the Compact, it had *no* monetary obligations that were already 'due and owing' or 'accrued.'" Def. Reply 22. But under settled contract law, a party incurs an obligation at the moment it breaches a contract. That obligation persists until satisfied regardless of whether a party has exercised its power to withdraw from a contract. See U.C.C. § 2-106(3) ("On 'termination' ... any right based on prior breach or performance survives."); *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc.* v. *NLRB*, 501 U.S. 190, 206 (1991) ("an expired contract has by its own terms released all its parties from their respective contractual obligations, *except obligations already fixed under the contract* but as yet unsatisfied") (emphasis added); 13 Sarah H. Jenkins, *Corbin on Contracts* § 68.9 (rev. ed. 2003) ("[T]he exercise of the power to terminate will not discharge the duty to pay damages for a prior breach of the agreement.").

North Carolina again asks this Court to interpret the Southeast Compact by referring to the text of other compacts. Def. Reply 16-17. It notes that the Midwest and Central Midwest Compacts generally require five years' advance notice for withdrawal,

failing to mention that both Compacts allow a designated host state to withdraw, with immediate effect and *no liability*, within 90 days of its designation. See Central Midwest Compact, Pub. L. No. 99-240, tit. II, § 224, Art. VIII(d)&(f), 99 Stat. 1880, 1891 (1986); Midwest Compact, Pub. L. No. 99-240, tit. II, § 225, Art. VIII(e)&(i), 99 Stat. 1892, 1900-01 (1986). The Southeast Compact contains no provision expressly allowing a host state to withdraw *without liability*. If these differences between compacts were significant, then the Southeast Compact's lack of such a provision would be a sign that host States may not withdraw without retaining extant obligations.

North Carolina also states that "[u]nlike the Southeast Compact, other compacts expressly authorize the imposition of sanctions on a former State for conduct occurring while it was a member." Def. Reply 16-17 (citing Central Midwest Compact, Midwest Compact, and Northeast Compact)). But, as noted, the Compact's penalty provision specifies that obligations continue "until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F). A monetary obligation includes a penalty accrued. Def. Reply 22. Thus, as the United States has argued, if North Carolina may be ordered to "return the funds it received during its Compact membership, North Carolina should not be allowed to avoid that obligation by exercising a unilateral right to withdraw." US Br. 30 n.9.

II. NORTH CAROLINA BREACHED THE COMPACT.

A. The Commission's Determination Of Breach Is Conclusive Or, Alternatively, Entitled To Deference.

The Southeast Compact's text states that the Commission "is the judge" of the parties' "compliance with the conditions and requirements of this compact." Art. 7(C). North Carolina, however, claims, without supporting citation, that this Court "must decide for itself whether North Carolina breached its Compact obligations" and that "[t]he requirement of full, non-deferential review by the Court follows from both the subject matter of the action (i.e., an interstate compact) and the nature of the Court's original jurisdiction." Def. Reply 25, 26.

North Carolina claims that *Texas* v. *New Mexico*, 462 U.S. 554 (1983), demonstrates that a compact cannot designate any adjudicator of breach other than a court. The decision, however, supports Plaintiffs' argument. There the Pecos River Compact was governed by a Commission, composed of one commissioner from each compacting state (Texas and New Mexico) and a non-voting commissioner representing the United States. *Id.* at 560. A dispute developed; and, because any action had to be approved by both voting commissioners, the commission was stalemated. In a subsequent original case, the special master proposed that either the United States' representative or some other third party break the tie. *Id.* at 562-64. This Court rejected that solution, stating that the compact did not provide for a third voting member, and that "no court may order relief inconsistent with [the compact's] express terms." *Id.* at 564-66.

This case does not support North Carolina's position – that the courts must decide every dispute among compacting states, even if the compact states agreed otherwise. Indeed, its focus on the compact text strongly suggests that when a compact expressly provides for another arbiter, this Court will enforce that provision. Relevant here, this Court noted, "[i]f it were clear that the Pecos River Commission was intended to be the exclusive forum for disputes between the States, then [the Court] would withdraw." *Id.* at 569. The Southeast Compact makes the Commission "the judge" of party States' compliance with the Compact, and this Court should enforce that term and uphold the Commission's determination of breach.

North Carolina next claims that if the Commission is empowered to judge anything, it is only a party State's qualifications to join the Compact, not its "'duties'" or "'obligations'" under the Compact. See Def. Reply 28-29; see also US Br. 29-30. This argument is perplexing. The Compact provides that the Commission "is the judge of the qualifications of the party states and of its members *and of their compliance with the conditions and requirements of this compact.*" Art. 7(C) (emphasis added). The provision could be limited to a determination of a state's "eligibility to become a 'party state' within the meaning of the Compact," Def. Reply 28, only by deleting the italicized phrase.[4]

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[4] North Carolina's limiting construction is further undermined by the first clause of Article 7(C) which delineates two groups: the "state eligible" and the "party state." The clause of Article 7(C) addressed above expressly applies to "party states," *i.e.*, those admitted to the Compact, not to "eligible" states.

Even more absurd is North Carolina's assertion that Article 7(C) applies only to "'conditions'" and "'requirements'" and that these terms do not include "'duties' or 'obligations' under the Compact." Def. Reply 29. The question whether a Compact party has fulfilled its "duties" or "obligations" is not materially different from the question whether that party has fulfilled the "requirements" and "conditions" of the Compact.

North Carolina also complains that the Commission's procedure for determining whether North Carolina breached the Compact was deficient because the Commission did not use the process set out in Article 7(F). See Def. Reply 28. As previously noted, however, Article 7(F) governs the Commission's imposition of sanctions, not its determinations of breach. Moreover, Article 7(F) states only that "[a]ny sanction shall be imposed only upon the affirmative vote of at least two-thirds of the Commission members." North Carolina has cited nothing that shows that the Commission did not fulfill this requirement. Indeed, before the Commission sent the two letters notifying North Carolina that it was in breach, the Commission discussed and voted on North Carolina's refusal to perform at numerous meetings. Moreover, in December 1999, after a full hearing, the Commission again – by unanimous vote – found North Carolina in breach and imposed sanctions. Undisputed Facts ¶ 64; Dec. 9, 1999 Sanctions Res. (App. 412). The Compact requires nothing more.[5]

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[5] Any North Carolina claim that it was entitled to Due Process, including an "adjudicative process, hearings, testimony, or examinations," Def. Reply 28, is wrong. The Fifth Amendment does not apply to States, *see South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). Moreover, North Carolina declined to

Further, the determinations of breach followed extensive deliberations and several Commission votes. The first determination, reflected in a January 12, 1998 letter from the Commission to North Carolina, see Hodes letter to Corgan (Joint Supp. Fact Br. App. 55), was sent after numerous Commission requests that North Carolina accept a proposed Memorandum of Understanding ("MOU") on project financing or provide an alternative funding mechanism. This has been fully set out in previous briefing. See Pls. Exceptions 10-12.

In fact, the Commission's first determination of breach came only *after* North Carolina informed the Commission that unless it funded the project, North Carolina would "commence the orderly shutdown of the project." Dec. 19, 1997 Corgan letter to Hodes (App. 319). This is a definitive declaration of intent to breach; if there were any procedural error here – and there was not – it was harmless.

The Commission's second determination that North Carolina was in breach of the Compact was made at the Commission's April 21, 1999 meeting. This determination followed a status report of the Monitoring and Policy and Planning Committees indicating that North Carolina had taken no steps in the licensing process. See Apr. 21, 1999 Minutes of Commission (App. 324). As a result, the Committees submitted a resolution to the Commission, adopted by over two-thirds of the Commissioners, finding that North Carolina was "in violation of the [Compact]" due to its failure "to proceed with the process of providing for the disposal of the region's low-level radioactive waste." *Id.*

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participate in the sanctions hearing that the Commission voluntarily provided.

At a minimum, any review of the Commission's determination of breach should be highly deferential, akin to the deference awarded to agency adjudications or arbitral awards.

North Carolina claims that this Court "rejected the administrative agency model in *Texas* v. *New Mexico* ... where the Compact did not make the commission the exclusive forum for resolving disputes among members." Def. Reply 29-30. But this determination was the direct result of the relevant compact's language. As in *Texas* v. *New Mexico*, "[t]he question for decision" here "is what role the [compact] leaves to this Court. ... If it were clear that the [compact] was intended to be the exclusive forum for disputes between the States, then [this Court] would withdraw." 462 U.S. at 568-69. The Southeast Compact explicitly provides that the Commission is "*the judge* of ... [the party States'] compliance with the conditions and requirements of this compact." Art. 7(C) (emphasis added). In at least one other context, this Court has cited nearly identical language in concluding that it was obligated to defer to the decision of another branch of government. See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 804 (1995) (holding that Article I, Section 5, Clause 1, which provides that "'[e]ach House *shall be the Judge* of the Elections, Returns and Qualifications of its own Members,'" gives Congress "the final say") (emphasis added).

North Carolina argues that *Old Town Trolley Tours of Washington, Inc.* v. *Washington Metropolitan Area Transit Commission*, 129 F.3d 201 (D.C. Cir. 1997), holding that arbitrary-and-capricious review is applicable to the review of a decision by an interstate compact commission, is inapt because the commission in that case "was not simultaneously asserting and

adjudicating its own monetary claim." Def. Reply 31-32. Nothing in the analysis supports this distinction. And, in any event, federal agencies routinely adjudicate enforcement actions that they bring against defendants, decisions which are then given deference by federal courts. See, *e.g.*, *Grid Radio* v. *FCC*, 278 F.3d 1314, 1317-18, 1322 (D.C. Cir. 2002) (upholding, under deferential standard, fine brought by FCC, adjudicated by FCC ALJ, and upheld by the FCC). If the Commission is not deemed the exclusive judge of breach as the Compact provides, at the very least, this Court should apply *Old Town Trolley*'s arbitrary-and-capricious standard. See 129 F.3d at 205.

Finally, North Carolina argues that the Commission is not entitled to the deference awarded to arbitral awards because the Commission was biased. Def. Reply 33. For support, North Carolina points only to the Commission's breach determination. That is hardly proof of bias; North Carolina, in effect, has admitted that it breached the Compact. See *infra* at 19.

Regardless, North Carolina freely entered into the Compact, which established the Commission as the adjudicator of breach. Given this, any institutional interests held by the Commission do not preclude this Court from enforcing the Commission's breach determination. See, *e.g.*, *Sheet Metal Workers Int'l Ass'n* v. *Jason Mfg., Inc.*, 900 F.2d 1392, 1398 (9th Cir. 1990) (refusing to vacate an arbitration award against an employer claiming bias where the employer consented to the arbitrator-selection procedures in its contract); *Garfield & Co.* v. *Wiest*, 432 F.2d 849, 853 (2d Cir. 1970) (plaintiff waived any objection to the arbitration panels because "[t]he selection of the arbitration panels was known to [the

plaintiff], and it most certainly knew" of the claimed bias).

This Court should enforce the terms of the Compact and affirm the Commission's determination that North Carolina breached the Compact or, at the very least, grant that determination substantial deference.

B. North Carolina Breached The Compact.

1. Breach By Non-Performance And Repudiation.

North Carolina does not dispute that the Compact required it to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type [was] filed with and issued by the appropriate authority." Art. 5(C); see Def. Reply 45. And, North Carolina admits that it took no steps to "seek a license" after December 1997. Def. Reply 58 n.14; see also North Carolina Admissions ¶ 11. Instead, upon learning that the Plaintiffs would provide no funds beyond the $80 million already authorized, unless North Carolina sought additional funding, North Carolina informed the Commission that it would "commence the orderly shutdown of the project." Dec. 19, 1997, Corgan letter to Hodes (App. 319). Whatever the scope of North Carolina's duty to take "appropriate steps" to secure a license, it was breached when North Carolina did *nothing*.

North Carolina, however, argues that the term "appropriate" is ambiguous. Def. Reply 53-54. Whatever ambiguity the term may have in the abstract or in the contexts cited by North Carolina, its meaning as used in the Southeast Compact, which deals with the disposal of low-level radioactive waste, is clear. When parties contract to undertake an activity in a heavily regulated industry such as nuclear waste, the "appropriate steps" are those taken pursuant to the

regulations established for that activity. Thus, the Atomic Energy Act of 1954, the Low-Level Radioactive Waste Policy Amendments Act of 1985, and the regulations promulgated by the Nuclear Regulatory Commission – which lay out the necessary (and thus appropriate) steps to license a waste facility – give meaning to the term "appropriate steps." North Carolina took such steps until it repudiated its obligations under the Compact. See Pl. Exceptions 32-33.

North Carolina denies that the relevant regulatory framework, referred to throughout the Compact, serves as a guide to the proper meaning of the term "appropriate steps." See Def. Reply 54 n.12. Although this regulatory regime does not use the precise term "appropriate steps," it does designate the steps which are appropriate in this setting. See 10 C.F.R. § 61.10; *id.* §§ 61.11-.16 (NRC regulations detailing the steps necessary to license and construct a low-level radioactive waste facility); cf. *Commercial Ins. Co. of Newark, N.J.* v. *Gonzalez*, 512 F.2d 1307, 1310 (1st Cir. 1975) ("[W]hen parties contract with reference to an industry whose terms are defined by an active supervising agency ... , it is to be assumed in the absence of evidence to the contrary, that they have that terminology in mind."). Yet, North Carolina admits that it did not take these – or *any* – steps toward licensing a facility after December of 1997. See North Carolina Admissions ¶ 11.

North Carolina also claims, without citation to the record, that it took appropriate steps when it "tr[ied] to negotiate different financial assistance measures." Def. Reply 53. The record reveals that all the negotiating effort was on the other side. A group of regional waste generators, in response to recommendations from a task force organized by the Commission that

included representatives from North Carolina, developed a draft MOU that attempted to address North Carolina's funding problems. Undisputed Facts ¶¶ 48, 52. The MOU proposed that the Commission expend the remainder of its available funds, approximately $20 million, and that the generators loan North Carolina $7 million. Draft MOU 3 (App. 294). This proposal was transmitted to North Carolina in August 1997, but, instead of endorsing the MOU or proposing an alternative, as the Commission required, North Carolina repudiated its Compact obligations in December 1997. See Undisputed Facts ¶¶ 52-54.

Nothing in the record indicates that North Carolina did anything to secure the necessary funding to complete its disposal facility. In fact, Governor Hunt informed the Commission that he would not request the appropriation of the necessary funds. See Apr. 8, 1996 Hunt letter to Hodes (App. 224).

North Carolina next attempts to define the term "appropriate steps" with reference to the Commission's 1988 resolution, which stated that it was "necessary and appropriate" to establish a Host State Assistance Fund. Def. Reply 46-52. The Commission's willingness to assist North Carolina did not relieve North Carolina of its independent contractual duty to provide the resources for and take appropriate steps toward licensing a facility.

The Commission repeatedly conveyed this position to North Carolina over the years. See, *e.g.*, Resolution, Feb. 9, 1988 ("[T]he Commission, *although not obligated to do so under the Compact*," provides this funding to North Carolina.) (emphasis added); Jan. 5, 1996 Hodes letter to Hunt (Joint Supp. Fact. Br. App. 3) ("[a]t some point, Commission funds will no longer be available to North Carolina ... , and North Caro-

lina will need to make alternative plans"). And throughout North Carolina's membership in the Compact, it understood that the Commission had no obligation to provide funding to the State. See, *e.g.*, Mar. 28, 1988, Martin letter to Hodes (App. 69) ("[T]he [North Carolina] Authority is responsible for the siting, *financing*, building, ... operating, ... and closing this regional facility.") (emphasis added); MacMillan, Executive Director of North Carolina Low-level Radioactive Waste Management Authority, Dep. Tr. at 40:13-:17 (App. 470) ("I knew that at any time [the Commission] could say no [to North Carolina's funding requests]."). And, on this point, the Compact is clear: "The Commission is not responsible for any costs associated with ... the creation of any facility." Art. 4(K)(1).

North Carolina's claim that the parties' course of performance demonstrates that the Commission was obligated to continue providing funding is wrong. Imposing such an obligation would directly contradict an express term of the Compact, which would violate basic contract law. See 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 31:4, at 274-78 (4th ed. 1999); see also *Cooper Distrib. Co.* v. *Amana Refrigeration, Inc.*, 63 F.3d 262, 279 (3d Cir. 1995) (Alito, J.) ("While extrinsic evidence, such as the course of performance evidence ... may be admissible to supplement or explain the terms of the agreement, *it cannot be used to contradict unambiguous terms.*") (emphasis added). This is particularly true here, because the Commission and North Carolina repeatedly stated their understanding that the Commission had no funding obligations with respect to North Carolina's facility.

North Carolina says that the Compact's express statement that the Commission has no funding obli-

gation "misses the point," because it "says nothing about whether the parties believed it would be 'appropriate' for North Carolina to fund the process *without* the Commission's *voluntary* assistance." Def. Reply 54 (second emphasis added).[6] The absence of a Commission obligation does not stand in isolation; all States understood that each state in turn would fund its own facility and recoup its costs once that facility was open. See, *e.g.*, N.C. Gen. Stat. § 104G-4 (App. 34). Plainly, it was not "appropriate" for North Carolina to make Commission funding a condition of fulfilling its obligations.

As the Compact and the record make explicit, the Commission's payments were voluntary and thus did not create a "course of performance" that *required* the Commission to continue funding North Carolina.

North Carolina independently breached the Compact by repudiating its Compact obligations. It did so when it stated in December of 1997 that, unless the Commission reversed its position on the provision of funds, North Carolina would "commence the orderly shutdown of the project." See Dec. 19, 1997, Corgan letter to Hodes (App. 319). A repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Restatement (Second) of Contracts* § 250(a) (1981). Moreover, "language that ... amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation." *Id.*

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[6] North Carolina says it was not required to take appropriate steps without outside financial assistance. *See, e.g.*, Def. Reply 46. By outside financial assistance, North Carolina actually means Commission assistance: it rejected the other outside assistance offered to it (the MOU). This contention contravenes the Compact. *See* Art. 4(K).

§ 250, cmt. *b*. When North Carolina made clear that it would not continue performance except under conditions contrary to the Compact's text, North Carolina repudiated the Compact as a matter of law.

North Carolina's argument that it took "appropriate steps" after December of 1997 can be reduced to a single point: "North Carolina ... 'continued to fund the Authority for almost two more years in the hope that alternative funding could be secured.'" Def. Reply 57 (quoting Second Report 27). Hoping for additional funding, while taking no action to secure that funding, does not fulfill a host State's obligation to take "appropriate steps" toward the licensing of a facility. In fact, North Carolina repudiated the Compact when it stated and followed through on its intent to cease performance.[7]

2. Breach By Bad-Faith Withdrawal.

North Carolina denies the existence of an implied covenant of good faith and fair dealing with respect to the Compact and, indeed, interstate compacts generally. Nothing in our federal system or in doctrines of judicial restraint, see *id.* 39-41, is offended by applying the established contract-interpretation doctrine of good faith and fair dealing to contracts among states. North Carolina cites no case law supporting its contention that the doctrine does not apply to interstate compacts. The law is to the contrary.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Restatement (Second) of Contracts*

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[7] The fact that North Carolina could have withdrawn from the Compact when it repudiated is of no legal significance. It did not withdraw until after its December 1997 cessation and repudiation.

§ 205. And, the federal common law of contracts applies to interstate compacts. *E.g.*, *Kansas* v. *Colorado*, 533 U.S. 1, 10-14 (2001); *Bebee* v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1288-90 (D.C. Cir. 1997). In fact, even when a governmental entity is a party to a contract, the contract contains an implied covenant of good faith and fair dealing. See, *e.g.*, *Ebasco Servs., Inc.* v. *United States*, 37 Fed. Cl. 370, 382 (1997) ("Every government contract contains an implied covenant of good faith and fair dealing."). Thus, North Carolina had a duty to act in good faith under the Compact.

North Carolina's contention that the Southeast Compact contains no language requiring parties to act in good faith, see Def. Reply 36-38, is beside the point. Likewise irrelevant is North Carolina's review of other low-level radioactive waste compacts enacted at the same time as the Southeast Compact. See *id.* 38-39. This duty is *implied* in all contracts. And the fact that other compacts restrict their party States' ability to withdraw does not eliminate the existence of an implied duty of good faith and fair dealing with respect to the terms of the Southeast Compact (or any of these other compacts).[8]

Applying the doctrine here, North Carolina withdrew from the Compact in bad faith as a matter of law. North Carolina accepted and actively invited assistance from the Commission over 11 years. Then, when North Carolina learned that it could no longer

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[8] The rule is the opposite. A party seeking to exclude the covenant of good faith and fair dealing from a contract must cite express language to that effect, *see, e.g.*, *Chem. Bank* v. *Paul*, 614 N.E.2d 436, 442 (Ill. App. Ct. 1993), if such a provision is effective, *see Aventis Envtl. Sci. USA LP* v. *Scotts Co.*, 383 F. Supp 2d 488, 508-09 (S.D.N.Y. 2005) (UCC prohibits parties from disclaiming the implied duty of good faith).

coerce money from the Commission, North Carolina refused to perform on the untenable ground that its duty to perform was thereby discharged – despite the unambiguous Compact language stating that the Commission is not responsible for funding the creation of a host State's regional facility.[9]

Finally, with a sanctions complaint pending, North Carolina precipitously withdrew from the Compact in an effort to escape accountability. North Carolina's conduct falls squarely within the definition of bad faith. See *Restatement (Second) of Contracts* § 205, cmt. *d* (bad faith includes "evasion of the spirit of the bargain" and "lack of diligence," "even though the actor believes his conduct to be justified").[10]

The Commission, in its authorized role as "judge" of the parties' "compliance with the conditions and requirements of this compact." properly determined that North Carolina breached its Compact obligations. But even if it had not, North Carolina plainly breached by non-performance, repudiated the Compact, and then withdrew in bad faith. This Court should hold North Carolina liable for this conduct.

III. THE PLAINTIFFS ARE ENTITLED TO RESTITUTION.

North Carolina makes two arguments that Plaintiffs are not currently entitled to restitution.

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[9] Here, Plaintiffs focus on North Carolina's bad faith withdrawal but do not waive their argument that North Carolina breached its covenant of good faith during the eleven-year process prior to withdrawal.

[10] North Carolina finds it significant that Plaintiffs do not discuss Article 7(H). Article 7(H), however, would have taken effect only if North Carolina met its Compact duties and constructed the second host state facility.

First, North Carolina argues that *even if* this Court determines that North Carolina breached the Compact, Plaintiffs' restitution claim would not be ripe. Def. Reply 59. "For every breach of contract, irrespective of its size or kind, the law will give an *immediate* remedy." 9 Arthur Linton Corbin, *Corbin on Contracts*, § 946, at 717 (Interim ed. 2002) (emphasis added). North Carolina's substantial breach and repudiation make restitution the appropriate remedy now. See *Mobil Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 614 (2000) ("[C]ontract law entitles a contracting party to restitution if the other party 'substantially' breached a contract or communicated its intent to do so.").

Indeed, North Carolina's repudiation of the Compact by itself makes the claim of restitution ripe. "[W]hen one party to a contract repudiates that contract, the other party 'is entitled to restitution for any benefit that he has conferred on' the repudiating party 'by way of part performance or reliance.'" *Id.* at 608 (quoting *Restatement (Second) of Contracts* § 373); accord 12 Corbin, *supra*, § 1104, at 13 ("In the case of a repudiation there is no doubt that the injured party [may obtain] restitution of such value as he may have already conferred upon the repudiator.").

Second, North Carolina argues that the party States are not entitled to restitution because only the Commission provided money to North Carolina. This assertion is incorrect for several reasons, including a Compact provision that makes clear that this money is the contribution of the party States[11] and the fact

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[11] The Compact expressly states that "the total" amount of all "fees or surcharges" levied on "all users of [the regional disposal] facility" "represents the financial commitments of all party

that the Commission is the agent of the party States and collected and held funds and conveyed funds to North Carolina as those States' authorized agent. See Pls. Reply 10-18. North Carolina continues to argue that the Commission is not the States' agent because it "was a separate legal entity acting on its own behalf." Def. Reply 60. As explained previously, this argument is unavailing. Pls. Reply 14-15. By law an agent is always a legal entity separate and distinct from the principal. *Restatement (Third) of Agency* § 1.01, cmt. *c* (2006) ("Despite their agency relationship, a principal and an agent retain separate legal personalities."). In sum, the Commission acted as the party States' agent in providing funds to North Carolina.

For this reason, among others, the Plaintiffs are entitled to restitution of the $80 million they conveyed, in what has turned out to be misplaced good faith, to North Carolina.

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states." Art. 4(H)(2) & (2)(b). All funds the Commission collected were raised by levying fees against entities that used the regional facility.

CONCLUSION

This Court should adopt Plaintiffs' exceptions and enforce the sanctions order or, in the alternative, order North Carolina to pay full restitution.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

BILL MCCOLLUM
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
STATE OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

ROBERT E. COOPER JR.
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

WILLIAM C. MIMS
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
(804) 786-2071

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, NC 27605
(919) 828-2501

Counsel for Plaintiffs

* Counsel of Record

September 9, 2009